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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-5525

CLYDE CADE, Petitioner

vs.

STATE OF ALABAMA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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VS.

STATE OF ALABAMA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

The Petitioner, Clyde Cade, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Alabama Supreme Court entered in this proceeding on May 25, 1979.

OPINIONS BELOW

The opinion of the Alabama Supreme Court appears attached hereto as Appendix A, which also contains the dissenting opinion of Justice Jones. The opinion of the Alabama Court of Criminal Appeals appears attached hereto as Appendix B. Neither opinion has appeared in published form as of the date of this petition.

JURISDICTION

The judgment of the Supreme Court of Alabama was entered on May 25, 1979. No petition for rehearing was filed. A timely application for extension of time in which to file Petition for Writ of Certiorari was filed and granted by Mr. Justice Powell, extending the time for filing this Petition to October 22, 1979. This Petition was timely filed, and the Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

I. Whether the state's unique statutory prohibition, which precludes juries in capital cases from considering factually established lesser included

offenses, deprives all persons accused of capital crimes of due process and equal protection rights guaranteed them by the Fourteenth Amendment, and whether said prohibition violates the cruel and unusual prohibition of the Eighth Amendment.

II. Whether the state's statutory provision which requires the jury to impose a death sentence upon every capital murder conviction contravenes the Eighth and Fourteenth Amendments of the United States Constitution, by encouraging arbitrary and wanton jury discretion.

III. Whether the failure of Alabama's capital sentencing scheme to require the State to prove the existence of aggravating circumstances beyond a reasonable doubt renders it violative of the due process clause.

IV. Whether the state statutory procedure which defers consideration of aggravating and mitigating circumstances until after a jury has imposed a sentence of death violates the Eighth and Fourteenth Amendments by placing the trial judge in a position of having to reduce a jury fixed death sentence if he deems the death penalty inappropriate.

V. Whether the statutory provisions which limit circumstances of mitigation violate the Eighth and Fourteenth Amendments by preventing the sentencer from giving independant mitigating weight to the offender's character and record and to circumstances of the offense proffered as a basis for a sentence less than death.

VI. Whether the failure of the state's death penalty scheme to provide a system of comparative review of sentences and to empower the appellate courts to vacate death sentences in appropriate cases makes that scheme violative of the Eighth Amendment's proscription against cruel and unusual punishment.

VII. Whether the Alabama death penalty statutes, as applied, constitute a mandatory death-sentencing scheme which violate the Eighth Amendment's prohibition of cruel and unusual punishment.

VIII. Whether the trial judge's consideration of the jury's death sentence as one of the aggravating circumstances weighed in his fixing the punishment at death violated the Eighth and Fourteenth Amendments.

CONSTITUTIONAL AND OTHER RELEVANT STATUTORY PROVISIONS

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Alabama law.

TITLE 13, CODE OF ALABAMA (1975)

CHAPTER II

Death Penalty and Life Imprisonment Without Parole.

§ 13-11-1. LIMITATION ON IMPOSITION OF DEATH PENALTY OR LIFE SENTENCE WITHOUT PAROLE.

Except in cases enumerated and described in section 13-11-2, neither a court nor a jury shall fix the punishment for the commission of treason, felony or other offenses at death, and the death penalty or a life sentence without parole shall be fixed as punishment only in cases and in the manner herein enumerated and described in 13-11-2. In all cases where no aggravated circumstances enumerated in section 13-11-2 are expressly averred in the indictment, the trial shall proceed as now provided by law, except that the death penalty or life imprisonment without parole shall not be given, and the indictment shall include all lesser offenses. (Acts 1975, No. 213, §1).

§ 13-11-2. AGGRAVATED OFFENSES FOR WHICH DEATH PENALTY TO BE IMPOSED; FELONY-MURDER DOCTRINE NOT TO BE USED TO SUPPLY INTENT; DISCHARGE OF DEFENDANT UPON FINDING OF NOT GUILTY; MISTRIALS; REINDICTMENT AFTER MISTRIAL.

(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment, and which offenses so charged with said aggravation shall not include any lesser offenses:

(1) Kidnapping for ransom or attempts thereof, when the victim is intentionally killed by the defendant;

(2) Robbery or attempts thereof when the victim is intentionally killed by the defendant;

(3) Rape when the victim is intentionally killed by the defendant; carnal knowledge of a girl under 12 years of age, or abuse of such girl in an attempt to have carnal knowledge, when the victim is intentionally killed by the defendant;

(4) Nighttime burglary of an occupied dwelling when any of the occupants is intentionally killed by the defendant;

(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job-related act or performance of such officer or guard;

(6) Any murder committed while the defendant is under sentence of life imprisonment;

(7) Murder in the first degree when the killing was done for a pecuniary or other valuable consideration or pursuant to a contract or for hire;

(8) Indecent molestation of, or an attempt to indecently molest, a child under the age of 16 years, when the child victim is intentionally killed by the defendant;

(9) Wilful setting off or exploding dynamite or other explosive under circumstances now punishable by section 13-?-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;

(10) Murder in the first degree wherein two or more human beings are intentionally killed by the defendant by one or a series of acts;

(11) Murder in the first degree where the victim is a public official or public figure and the murder stems from or is caused by or related to his official position, acts or capacity;

(12) Murder in the first degree committed while the defendant is engaged or participating in the act of unlawfully assuming control of any aircraft by use of threats or force with intent to obtain any valuable consideration for the release of said aircraft or any passenger or crewman thereon, or to direct the route or movement of said aircraft, or otherwise exert control over said aircraft;

(13) Any murder committed by a defendant who has been convicted of murder in the first degree in the 20 years preceding the crime; or

(14) Murder when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of witness, or when perpetrated against any human being while intending to kill such witness.

(b) Evidence of intent under this section shall not be supplied by the felony-murder doctrine.

(c) In such cases, if the jury finds the defendant not guilty, the defendant must be discharged. The court may enter a judgment of mistrial upon failure of the jury to agree on a verdict of guilty or not guilty or on the fixing of the penalty of death. After entry of a judgment of mistrial, the defendant may be tried again for the aggravated offense, or he may be reindicted for an offense wherein the indictment does not allege an aggravated circumstance. If the defendant is reindicted for an offense wherein the indictment does not allege an aggravated circumstance, the punishment upon conviction shall be as heretofore or hereafter provided by law; however, the punishment shall not be death or life imprisonment without parole. (Acts 1975, No. 213, §2).

§ 13-11-3. HEARINGS AS TO IMPOSITION OF DEATH PENALTY OR LIFE SENTENCE WITHOUT PAROLE AFTER CONVICTION; ADMISSIBILITY OF EVIDENCE; RIGHT OF STATE AND DEFENDANTS TO PRESENT ARGUMENTS.

If the jury finds the defendant guilty of one of the aggravated offenses listed in section 13-11-2 and fixes the punishment at death, the court shall thereupon hold a hearing to aid the court to determine whether or not the court will sentence the defendant to death or to life imprisonment without parole. In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements; provided further, that this section shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Alabama. The state and the defendant, or his counsel, shall be permitted to present argument for or against the sentence of death. (Acts 1975, No. 213, §3).

§ 13-11-4. DETERMINATION OF SENTENCE BY COURT; COURT NOT BOUND BY PUNISHMENT FIXED BY JURY.

Notwithstanding the fixing of the punishment at death by the jury, the court, after weighing the aggravating and mitigating circumstances, may refuse to accept the death penalty as fixed by the jury and sentence the defendant to life imprisonment without parole, which shall be served without parole; or the court, after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death. If the court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which if finds sufficient to support the sentence of death; and

(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances. (Acts 1975, No. 213, §4).

§ 13-11-5. CONVICTION AND SENTENCE OF DEATH SUBJECT TO AUTOMATIC REVIEW.

The judgment of conviction and sentence of death shall be subject to automatic review as now required by law. (Acts 1975, No. 213, §5).

§ 13-11-6. AGGRAVATING CIRCUMSTANCES.

Aggravating circumstances shall be the following:

(1) The capital felony was committed by a person under sentence of imprisonment;

(2) The defendant was previously convicted of another capital felony or a felony involving the use or threat of violence to the person;

(3) The defendant knowingly created a great risk of death to may persons;

(4) The capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom;

(5) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(6) The capital felony was committed for pecuniary gain;

(7) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or

(8) The capital felony was especially heinous, atrocious or cruel. (Acts 1975, No. 213, §6).

§ 13-11-7. MITIGATING CIRCUMSTANCES.

Mitigating circumstances shall be the following:

(1) The defendant has no significant history of prior criminal activity;

(2) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(3) The victim was a participant in the defendant's conduct or consented to the act;

(4) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;

(5) The defendant acted under extreme duress or under the substantial domination of another person;

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and

(7) The age of the defendant at the time of the crime. (Acts 1975, No. 213, §7).

§ 13-11-8. APPOINTMENT OF EXPERIENCED COUNSEL FOR INDIGENT DEFENDANTS.

Each person indicted for an offense punishable under the provision of this chapter who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years prior experience in the active practice of criminal law. (Acts 1975, No. 213, §8).

§ 13-11-9. EFFECTIVE DATE.

This chapter shall become effective on March 7, 1976. (Acts 1975, No. 213, §10).

STATEMENT OF THE CASE

Petitioner was tried and convicted on March 15, 1978, for the murder of L. D. Sizemore, Sheriff of Geneva County, Alabama. The trial was conducted pursuant to Alabama's post-Furman[1/], pre-Gregg[2/] death penalty statute, §§ 13-1 to 9, Code of Alabama (1975). At the end of a three-day trial, the jury found petitioner guilty and fixed the punishment at death.

Twelve days following the conclusion of the trial, the trial judge held a post-verdict sentencing hearing to determine whether or not the jury-fixed sentence of death should be reduced to life imprisonment without parole. At the sentencing hearing the state offered evidence of petitioner's prior convictions through pre-sentence reports and reports prepared by the state Board of Pardons and Paroles, and a statement taken by a state investigator. (R. 523-530) Although the petitioner presented no evidence, he argued that his severe emotional and personality problems should mitigate the imposition of the death penalty. Additionally, petitioner noted that the state presented no evidence of a lawful arrest of petitioner by Sheriff Sizemore. (R. 530-531)

Upon completion of the hearing, the trial court made certain written findings, among them being: (1) "that this Capital felony of first degree murder was committed for the purpose of avoiding or preventing a lawful arrest," (2) "that this Capital felony was committed to disrupt or hinder the lawful exercise of a government function or the enforcement of the Law." (R. 76-77) The Court further noted that it had considered the testimony concerning the diminished responsibility of the defendant, his state of mind at the time of the killing, his degree of intoxication, his mental competency, the circumstances surrounding the killing and whether or not it was done in the heat of passion. Having done so, the Court found that the defendant did not act under extreme duress and that he had the capacity to appreciate the criminality of his conduct, and his ability to conform his conduct to the requirements of law was not substantially impaired. (R. 78)

1/ Furman v. Georgia, 408 U.S. 238 (1972).

2/ Gregg v. Georgia, 428 U.S. 153 (1976).

The final written finding of the Court stated that, "the Court, after considering all the evidence in the case and the circumstances of the offense, together with the character and propensity of the defendant, Clyde Cade, and after weighing the aggravating and mitigating circumstances and the punishment of death by the jury, finds the defendant, Clyde Cade, should be sentenced to death". (R. 78)

Under the Alabama Automatic Appeal Statute, § 12-22-241, Code of Alabama (1975), see Boykin v. Alabama, 395 U.S. 238, 241 (1969), petitioner through appointed counsel attacked the constitutional validity of the Alabama death penalty statute, and furthermore presented other issues for review. On November 21, 1978, the Court of Criminal Appeals affirmed petitioner's conviction and sentence of death, specifically rejecting petitioner's constitutional challenge. (App. A, infra.) The Alabama Supreme Court affirmed in turn, on May 25, 1979. (App. B, infra.) One justice dissented on the ground that the death penalty statute was unconstitutional and also on the ground that the trial judge improperly considered the jury's death sentence as one of the aggravating circumstances considered by him in his judgment fixing the punishment at death. (App. B, p. 2, infra.) No petition for rehearing was filed.

HOW THE FEDERAL CONSTITUTIONAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner's federal constitutional challenges to the Alabama statutory procedures governing prosecution and sentencing in capital cases, and to their application in his particular case, were briefed before the Alabama Court of Criminal Appeals and before the Alabama Supreme Court, and were rejected on the merits by both Courts. The majority opinion of the Alabama Court of Criminal Appeals[3/] is devoted to the decision of these questions.

REASONS FOR GRANTING THE WRIT

Summary of Argument

I. Constitutionality of the Statute

In 1975, the Alabama Legislature, responding to its perception of

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3/ The opinion of the Alabama Court of Criminal Appeals and the opinion of the Alabama Supreme Court are unpublished as of the date of the filing of this petition.

the mandate of Furman v. Georgia, 408 U.S. 238 (1972), enacted the death penalty statute that is now found in Sections 13-11-1 to 13-11-9 of the Code of Alabama (1975). Passed as it was without the benefit of the Supreme Court's opinions in the 1976 death penalty cases, the statute combines the worst features of mandatory death sentencing and of inadequately channeled discretionary death sentencing.

The Alabama death penalty law decrees death for certain "aggravated offenses".[4/] At trial of the issue of guilt, the jury must either convict the defendant of the aggravated (capital) offense or acquit him completely because the statute provides that a capital offense "shall not include any lesser offenses". § 13-11-2(a). If the jury finds the defendant guilty of an aggravated offense, "it shall fix the punishment at death". Id. The trial judge is then required to hold a hearing to determine whether he will "refuse to accept the death penalty as fixed by the jury" and will instead sentence the defendant to life imprisonment without parole. § 13-11-4. After weighing the statutorily enumerated aggravating and mitigating circumstances,[5/] and "the fixing of the punishment at death by the jury", the judge "may accordingly sentence the defendant to death", or may reduce the jury-fixed death sentence. Id.

The Alabama statutory scheme is unique. No other American jurisdiction forbids a jury in a capital trial to consider evidentially supported lesser included offenses, requires the jury either to loose the defendant on the streets or fix his sentence at death and then compels the trial judge to "refuse to accept" the jury's mandatory death sentence if he believes that a sentence of life imprisonment is appropriate. This extraordinary procedure places both judges and juries in an untenable and irresponsible position and in so doing destroys essential safeguards that are constitutionally required in order to assure "reliability in the determination that death is the

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4/ Section 13-11-2(a) enumerates the fourteen aggravating allegations which trigger a capital indictment.

5/ The aggravating circumstances are found in § 13-11-6, and the mitigating circumstances are found in § 13-11-7.

appropriate punishment in a specific case", Woodson v. North Carolina, supra, 428 U.S. at 305 (plurality opinion).

Additionally, Alabama's statutes do not require the state to prove the aggravating circumstances, upon which the trial judge must base a death sentence, beyond a reasonable doubt.[6/] This failure flies in the face of due process and the requirement "for a greater degree of reliability where the death sentence is imposed". Lockett v. Ohio, __U.S.__, 57 L.Ed.2d 973, 989 (1978).

After a defendant is convicted and sentenced to death, his conviction is automatically reviewed by the appellate courts. The appellate courts do not conduct a comparative review nor do they possess the power to vacate the inappropriate death sentences. Thus the Alabama death penalty scheme lacks an important ingredient of constitutionality, proper comparative appellate review of death sentences.

Finally, the Alabama death penalty law as applied is unconstitutional because it is mandatory. Rather than offering a system for consideration of the individual attributes of an offender and the circumstances of a particular crime, Alabama offers a system with an 86% death sentence rate. No system which permits such a mandatory imposition of capital punishment can be constitutional.

II. Consideration by Trial Judge of jury's death sentence as aggravating circumstance in fixing punishment at death.

The trial Judge improperly considered the jury's death sentence as an aggravating circumstance in fixing punishment at death. The trial proper furnished the jury neither adequate data of aggravation and mitigation nor legal guidelines for the exercise of guided discretion in sentencing. Therefore, to allow the trial Judge to consider the jury's verdict of death as an aggravating circumstance in arriving at his ultimate judgment of the death penalty is to commit the same error compounded.

6/ See § 13-11-4 (1) and (2).

I

ALABAMA'S UNIQUE STATUTORY PROHIBITION, WHICH PRECLUDES JURIES IN CAPITAL CASES FROM CONSIDERING FACTUALLY ESTABLISHED LESSER INCLUDED OFFENSES, DEPRIVES ALL PERSONS ACCUSED OF CAPITAL CRIMES OF THE DUE PROCESS AND EQUAL PROTECTION RIGHTS GUARANTEED THEM BY THE FOURTEENTH AMENDMENT AND VIOLATES THE CRUEL AND UNUSUAL PROHIBITION OF THE EIGHTH AMENDMENT.

A. Legislative History.

The submission to the jury of lesser included offenses which are supported by the evidence is a commonplace of American criminal jurisprudence. In Alabama, by statute, the court is required in every murder case to charge on both first and second degree murder.[7] It is also required to charge on other degrees of homicide, "if there is any reasonable theory which could support the position".[8] Fulghum v. State, 291 Ala. 7, 277 So.2d 886 (1973).

Under the death penalty statute, however, the trial jury is precluded from considering lesser included offenses that can factually be found in a capital case. § 13-11-3(a). If the jury believes that the defendant has committed some degree of homicide but not capital murder, it is given the Hobson's choice of acquitting a killer or of returning a verdict evidencing the finding of elements about which the jury is not satisfied beyond a reasonable doubt, and carrying a death sentence.

Apparently, the Alabama legislature drafted this preclusion of lesser included offenses in 1975 because it believed Furman v. Georgia, 408 U.S. 238 (1972), required such a draconian approach. Cf. Lockett v. Ohio, ____U.S. _____, 57 L.Ed. 2d 973, 986-7, n.7 (1978) (plurality opinion); Jackson v. State, 337 So.2d 142 (Miss. 1976). Alabama was alone in its belief, however, because none of the 34 other states enacting capital punishment laws after Furman included such a provision in their statutes.

7/ § 13-1-73, Code of Alabama (1975). Under Alabama law first degree murder is wilful, deliberate, malicious and premeditated killing. All other common law murder is murder in the second degree. § 13-1-70, Code of Alabama (1975). A person convicted of first degree murder is automatically sentenced to life in prison while a person convicted of second degree murder is sentenced, at the discretion of the jury, to a term of imprisonment of not less than 10 years. § 13-1-74, Code of Alabama (1975).

8/ In Alabama, the other degrees of homicide are manslaughter in the first degree and manslaughter in the second degree. § 13-1-90, Code of Alabama (1975).

Subsequent to the enactment of the Alabama statute, the Supreme Court handed down its decision in Gregg v. Georgia, supra. Therein, the Court withdrew the foundation for that belief, holding that blanket preclusion of lesser included offenses would be alien to our present system of criminal justice. Id. 428 U.S. at 199-200, n. 50 (plurality opinion).

Since the date of the Gregg decision, 23 states have enacted new death penalty statutes.[9/] Not one of these statutes contains a provision precluding the consideration of lesser included offenses.

B. The Due Process Violation.

An Alabama capital defendant can be convicted and sentenced to die in cases where the jury has not been convinced, beyond a reasonable doubt, of all the elements of the offense charged. This absurd result is made possible by the statutory provision which precludes consideration of factually established lesser included offenses.

When a jury is precluded from considering lesser offenses, and where one of the elements of the offense charged remains in doubt, but the accused is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction. Keeble v. United States, 412 U.S. 205 (1973). In the context of a capital case this means that if a jury is convinced that an accused unjustifiably killed someone, but doubts that the requisite specific intent was present, faced with the lesser offense preclusion, it will likely "resolve its doubts in favor of conviction", even though the defendant may only be guilty of manslaughter. Id. at 213. In such a situation, the statute enables the state to obtain a capital conviction without proving the element of intent beyond a reasonable doubt.

Such an erosion of the reasonable doubt standard violates due process. Due process requires the state to prove every element of every offense charged beyond a reasonable doubt. Addington v. Texas, 25 Crim. L. Rptr. 3039 (May 2, 1979); In re Winship, 397 U.S. 358 (1970). In the words of Mr. Chief Justice Burger,

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9/ California, Delaware, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Nevada, New Hampshire, New Mexico, North Carolina, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Washington and Wyoming.

> In the administration of criminal justice our society imposes almost the entire risk of error upon itself. This is accomplished by requiring under the Due Process Clause that the state prove the guilt of an accused beyond a reasonable doubt.10/

By encouraging capital juries to disregard this heaviest burden of proof, the Alabama statute reduces the risk on society and places it on the shoulders of defendants. Such a system cannot be permitted to stand, particularly in the context of capital cases, where the punishment is irreversible.

In Keeble, supra, the United States Supreme Court struck down a statutory system which precluded the jury from considering lesser included offenses. Holding that the federal Major Crimes Act could not be construed to preclude a lesser offense instruction, the Court reasoned that a contrary construction would expose defendants to a substantial risk of unwarranted convictions, as follows:

> True, if the prosecution has not established beyond a reasonable doubt every element of the offense charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser included offense instruction -- in this context or any other -- precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of some offense, the jury is likely to resolve its doubts in favor of conviction.

Id. at 212-213 (emphasis added).

The Supreme Court re-affirmed its position in Gregg v. Georgia, supra. There the Court was faced with the argument that the availability of a lesser offense instruction provided capital juries with too much discretion to satisfy the concerns set forth in Furman v. Georgia, supra. The Court rejected this argument, thereby eliminating any doubt as to the constitutional importance of preserving a capital defendant's right to such an instruction. Specifically, the plurality opinion held that a criminal justice system which, among other things, precludes lesser offense instructions "would be totally alien to our notions of criminal justice" and "would be unconstitutional". Gregg, supra, 428 U.S. at 199-200, n. 50.

Lower federal courts have also held that preclusion of appropriate

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10/ Addington, supra at 3041.

lesser offense findings jeopardize defendants' rights to fair jury fact finding. E.g., Joe v. United States, 510 F.2d 1038, 1042 (10th Cir. 1975) (holding Keeble should be applied retroactively in § 2255 collateral proceeding because deprivation of a lesser offense instruction "affected a right which Keeble recognized as fundamental against the background of the Due Process Clause"); United States v. Comer, 421 F.2d 1149, 1153-1154 (D.C. Cir.) (reversing conviction for failure to give lesser offense instruction on the ground that such an instruction would ensure that the jury would not return a verdict "in disregard to the proof"); United States vs. Tsanas, 572 F.2d 340, 346 (2d Cir. 1978), cert. denied. 98 C.Ct. 1647 (1978) ("the court should give the form of [lesser offense] instruction which the defendant seasonably elects. It is his liberty that is at stake and the worst that can happen to the Government under less rigorous instruction is his readier conviction for a lesser rather than greater crime"); United States ex rel. Powell v. Pennsylvania, 294 F.Supp. 849, 852 (E.D. Pa. 1968) (failure to give lesser offense error requiring federal habeas corpus relief"). Accord: United States ex rel. Matthews v. Johnson, 503 F.2d 339 (3d Cir. 1974).

Moreover, the unfairness of a system precluding lesser offense findings, as well as the dilution of the reasonable doubt standard caused by such a system, has long been recognized by legal writers. Koenig, The Many - Headed Hydra of Lesser Included Offenses: A Herculean Task for Michigan Courts, Vol. 1975, Detroit Coll. L. Rev. 41, 52 (Issue 1) ("If the jury is allowed to convict only on the major offense, it may convict because it feels that the defendant is guilty of something, and not because the state has proved all elements of the charged crime beyond a reasonable doubt. Although in fact the defendant might be guilty only of a lesser offense, he is convicted of a greater crime which carries more punishment than he deserves"); Comment, The Lesser Included Offense Doctrine In Iowa; The Gordian Knot Untied, 59 Iowa L.Rev. 684 n. 5 (1974) -- ("[After quoting from the above article, the author adds that] the lesser included doctrine mitigates against this tendency by allowing the jury to correlate more closely the criminal act than the criminal conviction. The outcome is "fundamentally fairer to the defendant and fairer to the state, too"); Comment, The Lesser Included

Offense Instruction -- Problems With Its Use, 3 Land and Water L.Rev. 587, 590 (1968) ("There are two obvious situations in which the ... non-use of lesser included offense instructions may be unfair ... the jury may be faced with the choice either of acquitting a man who is obviously guilty of some wrong or of finding guilty a man who is not guilty of the crime charged -- For example, when there is evidence to support second degree murder but only first degree murder is instructed upon, the jury may have to choose between setting free a man whom they believe to be guilty of second degree murder or convicting a man whom they do not believe guilty of first degree murder"); Comment, Jury Instructions or Lesser Included Offenses, 57 N.W L.Rev. 62, 64 (1972) ("... the danger is that a jury faced with a choice between conviction of a greater offense and acquittal will convict on insufficient evidence rather than let a defendant they believe guilty of some wrong doing go free.)"

Although the vice of a system precluding lesser included instructions is readily apparent,[11/] the Court should see that, in application, the vice is real and not imagined. Justice Jones of the Alabama Supreme Court aptly described the all-too-real vice of such a system in his dissent in Jacobs v. State, 361 So.2d 640, 649-51 (Ala. 1978):

> That the statutory scheme of our death penalty Act hampers, and thus impugns, the fact-finding process, presenting the jury with a "Hobson's choice", is dramatized by the voir dire in the instant case.

11/ The State may argue that the deficiencies of this provision are remedied in each case by the juror's solemn oath to follow the instructions of the court. That is, in a capital case, the state would argue that the jury would acquit a robbery-murder defendant if they found him guilty of murder, but not guilty of robbery, because the Court would so instruct them.

The holdings of the Supreme Court in Jackson v. Denno, 378 U.S. 368 (1964) and Bruton v. United States, 391 U.S. 123 (1968) refute this contention. In both of these cases, in the context of instructions that the jurors not consider certain incriminating evidence, the court recognized that jurors cannot and do not always follow such instructions. By analogy, this reasoning should apply to instructions to jurors that they acquit defendants whom they are convinced are guilty of murder, since such a "jury is likely to resolve its doubts in favor of conviction". Keeble, supra.

"A. [Prospective juror Jack R. Chandler] What you're saying is there's no in-between?
"Q. No in-between.
"A. Even though he was found guilty of a lesser crime?
"Q. Yes, sir.
"A. He still would get the death penalty, even though it was a lesser crime?
"Q. Either that, or you turn him loose completely.
"A. Well, why don't you have an in-between? Why is it either 'do' or 'don't'?
"Q. I can't answer that question; but would you hesitate to find the defendant not guilty? 12/
"A. Yeah, I'd hesitate to find him not guilty."

(The trial Judge sustained the challenge for cause of this prospective juror). An earlier examination proceeded thusly:

"Q. If the evidence is not strong enough to justify your finding the defendant guilty and fixing the death penalty -- yet guilty of a crime of some kind -- do you think that you could acquit the defendant under those conditions?
"A. [Prospective Juror Earl D. Allison] Not if he was guilty of some crime. No sir."

Furthermore, the trial Judge, at the post-trial sentence hearing acknowledged the jurors' frustration in this regard:

The jurors do not like this law. That seemed to be the comment we got when each juror was questioned on voir dire. . ."

Alarmingly, this system has resulted in a veritable march to death row. Since the lesser offense preclusion went into effect, amazing results have been achieved. During the first 33 months of the law's operation, Alabama prosecutors attained a 96% conviction rate in capital cases where the defendant pleaded not guilty and an 86% death sentence rate where the

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12/ This excerpt also refutes the incredible contention by the State in its previous briefs that the jury's ability to mistry a case eliminates the Hobson's choice. Alabama's trial judges, at least, are of the opinion that there is "no in-between". Like the judge quoted above, they have regularly sustained challenges for cause to jurors who expressed reservations about the "all or nothing" choice.

Moreover, a mistrial is declared when a jury cannot reach a verdict, due to opposing views, in contrast to a situation where the jury is in agreement as to a disposition of the case. Thus, even in a mistrial, all jurors must make a Hobson's choice.

Finally, to this writer's knowledge, no capital jury in Alabama has been instructed that a mistrial is one of its options. In one case, State of Alabama v. James Willie Cochran, (appeal pending in the Alabama Court of Criminal Appeals), the defense requested such an instruction. The prosecution objected and the trial court refused to give it.

jury rendered a verdict of guilty and the issue of punishment was contested.[13] These statistics starkly deviate from the expected norm stated by the Supreme Court in Woodson v. North Carolina, 428 U.S. at 285, n. 31: "Data compiled on discretionary jury sentencing of persons convicted of capital murder reveal that the penalty of death is generally imposed in less than 20% of the cases". Therefore, the results achieved by the application of this statute underscore the need to overturn it.

Plain and simply, this provision of the Alabama law violates due process, both in theory and in practice, because it undercuts the foundation of the criminal justice system, the requirement that the state prove every element of the offense charged beyond a reasonable doubt.

C. The Equal Protection Violation.

This provision of the Alabama law also violates the equal protection rights of individuals charged with capital offenses. Because non-capital Alabama defendants continue to have the safeguard of a lesser included instruction, the law in effect singles out capital defendants. It thereby burdens two fundamental constitutional rights: the right of all persons to life and the right of an accused to require the state to prove guilt beyond a reasonable doubt.

A right is fundamental if it is "explicitly or implicitly guaranteed by the Constitution". San Antonio School District v. Rodriguez, 411 U.S. 1, 33 (1973). The right of all persons to life is explicitly guaranteed in the Fifth and Fourteenth Amendments to the Constitution. The right of an accused to require the state to prove guilt beyond a reasonable doubt is implicitly guaranteed by the Due Process Clause of the Fourteenth Amendment.[14] Therefore, under the test enunciated by the Supreme Court in San Antonio, the rights involved in the case sub judice are fundamental.

Because these rights are fundamental, the statute must undergo strict

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13/ See Appendix C.

14/ See Addington, supra. at 3041 ("This is accomplished by requiring under the Due Process Clause that the State prove the guilt of an accused beyond a reasonable doubt"), and Winship, supra at 364 ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged").

scrutiny to determine whether it is "necessary to promote a compelling governmental interest". Shapiro v. Thompson, 399 U.S. 618, 634 (1969). Alabama's death penalty statute cannot withstand scrutiny under this standard.

The only interest asserted by the state in support of the statutory preclusion of lesser offense consideration in capital cases is the need to comply with the Supreme Court's ruling in Furman, by controlling undue jury discretion and nullification.[15/] This objective falls short of being "necessary to promote a compelling governmental interest".

Gregg and its companion cases squarely held that the concerns expressed in Furman for consistently-applied capital sentencing could be satisfied by capital punishment statutes which permit juries to consider lesser included offenses.[16/] The Gregg plurality opinion of Justices Stewart, Powell and Stevens stated that elimination of lesser included instructions would be "totally alien to our notions of criminal justice". 428 U.S. at 199-200, n. 50.

The upholding of the Georgia, Florida and Texas statutes demonstrates the lack of a necessity to withdraw consideration of lesser included offenses from capital juries in order to comply with Furman. The laws of these three states, as well as those of the other thirty states (excluding Alabama) with capital punishment laws, illustrate the less restrictive means available to meet the objective of a constitutional capital sentencing structure. Thus, the preclusion of factually established lesser included offenses is not "necessary" to promote any compelling governmental interest.

D. The Eighth Amendment Violation.

Alabama's unique "kill 'em or set 'em free" statutory scheme also violates the cruel and unusual punishment provision of the Eighth Amendment. It has already been established that the preclusion of lesser offenses: (1) unnecessarily hampers the fact-finding process; (2) undercuts the constitutional requirement that the state prove guilt beyond a reasonable doubt; (3) has resulted in an inordinately high conviction and death sentence rate; and

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15/ This assertion appears at p. 24 of Respondent's Brief In Opposition to Petition for Writ of Certiorari in Jacobs v. Alabama.

16/ See Gregg, supra at 163, 199; Proffitt v. Florida, supra, 428 U.S. at 254; and Jurek v. Texas, supra, 428 U.S. at 274/

(4) has singled out capital defendants, the very persons who have the most to lose, their lives. In addition, this portion of the Alabama statute fails to reflect "contemporary community values" and "contemporary standards of decency",[17/] contrary to the requirements of the Eighth Amendment.

To survive Eighth Amendment scrutiny, newly enacted death penalty statutes must reflect societal acceptance rather than an attempt merely to retain the death penalty in a form consistent with the constitution.[18/] The state has never presented evidence of societal acceptance of its unique statutory scheme, which has the practical effect of obviating the necessity for proof beyond a reasonable doubt only in cases where the penalty is death.

The state's failure to demonstrate societal acceptance of its statutory scheme becomes more conspicuous when considered in the light of the Supreme Court's decision in Coker v. Georgia, 433 U.S. 584 (1977). In Coker the Court struck down the Georgia statute which permitted the punishment of death for rape, because it violated the Eighth Amendment proscription of cruel and unusual punishments. In so holding, the Court stressed the need to consider the legislative attitudes of other states to determine whether a particular statutory provision violates the Eighth Amendment. Id. at 592.

After tracing the legislative history of the death penalty for rape in the United States, the Court found Georgia's solitude in providing capital punishment for rape to be persuasive evidence of an Eighth Amendment violation. Specifically, the Court stated:

> The upshot is that Georgia is the sole jurisdiction in the United States at the present time that authorizes a sentence of death when the rape victim is an adult woman, and only two other jurisdictions provide capital punishment when the victim is a child.

Id. at 595-6.

Likewise, Alabama is the sole jurisdiction in the United States at the present time that prohibits the consideration of factually established lesser included offenses in capital cases. As such, under Coker, Alabama's solitude is persuasive evidence of an Eighth Amendment violation.

17/ See, e.g., Woodson v. North Carolina, supra, 428 U.S. at 295-6.

18/ Id. at 298.

To summarize, the state has made no showing that Alabama's "one of a kind", "kill 'em or set 'em free" provision of its capital punishment statute reflects contemporary community values and standards of decency. Therefore, this provision of the statute cannot be applied consistently with the "Eighth and Fourteenth Amendments' requirement that the state's punishment power be exercised within the limits of civilized standards", Woodson, supra at 301, and it must be struck down.

II

THE STATUTORY PROVISION WHICH REQUIRES THE JURY TO IMPOSE A DEATH SENTENCE UPON EVERY CAPITAL MURDER CONVICTION CONTRAVENES THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION, BY ENCOURAGING ARBITRARY AND WANTON JURY DISCRETION.

As previously noted, the Alabama death penalty statute requires the jury to "fix the punishment at death" whenever it convicts a defendant of a capital offense. § 13-11-2(a). The mandatory character of this jury-fixed death sentence taints Alabama's capital trial procedures with one -- although admittedly not all -- of the vices which the Supreme Court condemned in Woodson v. North Carolina, supra, 428 U.S. at 302-303 (plurality opinion), and Stanislaus Roberts v. Louisiana, supra, 428 U.S. at 334-335 (plurality opinion). Under the Alabama scheme, "it is only reasonable to assume that many juries ... will continue to consider the grave consequences of a conviction in reaching a verdict", Woodson v. North Carolina, supra, 428 U.S. at 303, and so will exercise a "de facto sentencing discretion", Stanislaus Roberts v. Louisiana, supra, 428 U.S. at 335, by refusing to convict defendants whom they feel do not deserve to die, even though unquestionably guilty. Indeed, the Alabama Supreme Court made exactly this assumption, and gave it the stamp of state judicial approval:

> We are further convinced that trial juries will consider the serious consequences of a guilty verdict and will either refuse to fix the penalty at death, or will acquit the defendant.

Jacobs v. State, supra, 361 So.2d at 645. Thus the question is squarely presented whether this "separate deficiency", Woodson v. North Carolina, supra, 428 U.S. at 302, which the Court relied upon to invalidate the North Carolina and Louisiana statutes, also invalidates Alabama's.

This deficiency of the Alabama statute is complicated by the overlapping deficiency discussed in the previous section of this brief. That is, while on the one hand juries may acquit guilty defendants whom they feel do not deserve to die, other juries may convict defendants who are not guilty of capital murder, but are guilty of a lesser included offense, because they do not want to set free a "murderer" or "manslaughterer". A statute which by its mandatory nature serves as a vehicle to set free guilty capital murderers on the one hand, and to sentence non-capital offenders to die on the other hand, cannot pass constitutional muster, because, as in North Carolina and Louisiana, the demand that the jury declare for life or death by its vote on innocence or guilt has "simply papered over the problem of unguided and unchecked jury discretion" and failed to "fulfill Furman's basic requirement by replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death". Woodson v. North Carolina, supra, 428 U.S. at 302, 303.

It is no answer to say, as the Alabama Supreme Court has said, that the post-jury-verdict judicial hearing on aggravating and mitigating circumstances remedies this deficiency. Certainly this judicial hearing will not lessen the arbitrariness of the jury's decision. In the first place, the jurors may not even be aware that such a hearing exists. If the jurors do know about it, their knowledge certainly will not inform or guide their deliberations in any regular or reviewable channels. The jury's willingness or unwillingness to subscribe to a death verdict can still express itself only "lawlessly" under the guise of a guilt/innocence determination, Woodson v. North Carolina, supra, 428 U.S. at 303,[19/] and be formed only upon the record of the trial of guilt or innocence, lacking as it usually is in "[m]uch of the information that is relevant to the sentencing decision", Gregg v. Georgia, 428 U.S. at 190 (plurality opinion). Such speculation as the jury may indulge

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19/ The majority opinion of the Alabama Supreme Court in Jacobs v. State, supra, 361 So.2d at 643, admits, as it must, that the jury obviously is not provided with guidelines to aid it in fixing the punishment; in fact, the statute directs the jury, if it finds the accused guilty, to fix the punishment at death. The jury has no discretion to fix any other punishment.

in regarding the trial judge's possible reduction of its verdict introduces nothing but an additional dimension of vagary into the process.

Moreover, the jury's sense of accountability is likely to be attenuated by whatever knowledge it may have of the judge's power to reduce the sentence it has "fixed". The entire sentencing process is not thereby made more reliable, but less responsible. For, as we shall see in the following subsection of this brief, the Alabama procedure strongly encourages the judge to accept, not "refuse to accept", the jury's death verdict. The prospect of each nominal sentencing agent deferring to the other while the defendant suffers the death sentence that is statutorily required to be fixed in the jury's verdict holds no promise of either reliability or responsibility.

Finally, the trial judge does not review the jury's verdict in any sense. He has no more capability that his North Carolina and Louisiana counterparts had to "check arbitrary and capricious exercise of [the jury's] ... power". Woodson v. North Carolina, supra, 428 U.S. at 303. If the jury votes for death, he may choose to supersede it; but his choice cannot be made upon the basis of any understanding of its unfathomable verdict. In short, as Justice Jones wrote in dissent in Jacobs v. State, supra, 361 So.2d at 650, the judge's "subsequent consideration of mitigating factors cannot rectify the unconstitutionally unreliable sentence already imposed".[20/]

20/ Of course, if one indulges the assumption -- contrary to Woodson and Stanislaus Roberts -- that the jury's verdict will not reflect sentencing considerations but will respond entirely to questions of guilt or innocence and to the jury's statutory obligation to fix the punishment upon conviction at death, then the Alabama procedure raises the constitutional issue which was included in the grant of certiorari, but whose decision was reversed, in Lockett v. Ohio, supra: whether juries can be wholly excluded from participation in the capital sentencing decision. That issue is also raised, albeit in somewhat different form, if the jury's participation in capital sentencing is conditioned upon its "willingness to act lawlessly", Woodson v. North Carolina, supra, 428 U.S. at 303. Alabama juries either have no sentencing power, or they have a lawless and arbitrary sentencing power: In either event, the Alabama system violates the Eighth and Fourteenth Amendments.

III

THE FAILURE OF ALABAMA'S CAPITAL SENTENCING SCHEME TO REQUIRE THE STATE TO PROVE THE EXISTENCE OF AGGRAVATING CIRCUMSTANCES BEYOND A REASONABLE DOUBT RENDERS IT VIOLATIVE OF THE DUE PROCESS CLAUSE.

Alabama's capital sentencing scheme does not require the state to prove the existence of aggravating circumstances beyond a reasonable doubt. Instead, a trial judge who fixes the punishment at death must merely list "one or more of the aggravating circumstance ... which it finds exists" and "any of the mitigating circumstances ... which it finds insufficient to outweigh the aggravating circumstances". § 13-11-4 (1) and (2). Such a system violates due process.

The sentencing process in a capital case must comport with due process. Such was the holding of the Supreme Court in Gardner v. Florida, 430 U.S. 349 (1977). In the words of Mr. Justice Stevens, "[I]t is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause". 430 U.S. at 358.[21/]

Moreover, an accused's right to require the state to prove his guilt beyond a reasonable doubt is a due process right. In re Winship, supra; Addington v. Texas, supra, 25 Crim. L. Rptr. at 3041. Therefore, due process can be satisfied only when the state proves the existence of aggravating circumstances, beyond a reasonable doubt. Because the Alabama statute has no such requirement, and because Alabama trial judges have not construed the statute to implicitly carry such a requirement, all death sentences thus far meted out under the present statutory scheme do not comply with the Due Process Clause.[22/]

The failure of Alabama's statute to require proof of aggravation beyond a reasonable doubt not only violates due process, but also fails to satisfy the higher "need for reliability in the determination that death is

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21/ See also Presnell v. Georgia, ___U.S.___, 58 L.Ed. 2d 207, 211 (1978) ("These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phase of any criminal trial.").

22/ The Georgia, Florida, and Texas statutes upheld by the Supreme Court in 1976 all require proof of aggravating circumstances beyond a reasonable doubt.

the appropriate punishment" in capital cases. This greater need for reliability in capital cases was first articulated in Woodson, supra, 428 U.S. at 305, as follows:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Most recently, Mr. Chief Justice Burger cited this rationale in support of the Court's conclusion that an individualized sentencing decision is required in capital cases. Lockett v. Ohio, supra, 57 L.Ed. 2d at 989 (1978).[23/]

Also in the context of the capital sentence process, Mr. Justice White relied upon the "greater need for reliability" standard in concurring in the reversal of a Florida capital defendant's death sentence, in Gardner, supra. Unlike the plurality of the Court, he found it unnecessary to rely on the due process clause, however, because, in his opinion, the procedure involved failed "to meet the 'need for reliability in the determination that death is the appropriate punishment' which the Court indicated was required in Woodson". Id., 430 U.S. at 364. By the same token, in the case sub judice, the lack of a requirement that aggravation be proved beyond a reasonable doubt fails to meet the "greater degree of reliability" that is required "when the death sentence is imposed". Lockett, supra at 989.

The Nebraska Supreme Court's decision in State v. Simants, 250 N.W. 2d 881 (Neb. 1977) demonstrates the validity of this conclusion. Simants involved the Court's seminal interpretation of Nebraska's post-Furman capital punishment statute.

Like the Alabama statute, the Nebraska statute does not specifically require proof of aggravating circumstances beyond a reasonable doubt. Accordingly, Simants argued that the failure to require proof of aggravation beyond a reasonable doubt rendered the statute unconstitutional. Citing the greater "need for reliability" language of the Supreme Court in Woodson, quoted above, the Court construed the "intent of the act" to require proof of aggravating

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23/ "We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability where the death sentence is imposed."

circumstances beyond a reasonable doubt, even though the language of the statute did not specifically so require. Id. at 888.

Therefore, this Court can choose to follow one of two courses of action. It can either follow the lead of the Nebraska Supreme Court and hold that the Alabama statute implicitly requires proof of aggravation beyond a reasonable doubt, or it can strike down the statute. If the Court adopts the first alternative, all forty-three death sentences imposed in Alabama will have to be remanded to the trial courts for an initial factual determination of whether any of the statutory circumstances were established beyond a reasonable doubt. If the Court chooses the second course, the legislature will have to correct this and the other enumerated deficiencies of the statute.

In summary, whether the Court chooses to rely on the Woodson higher-standard-of-reliability rationale or the Gardner due process holding, it must order that some corrective action be taken, because the Constitution simply will not permit a death sentence to stand where the aggravating circumstances upon which it was based were not proved beyond a reasonable doubt.[24/]

IV

THE STATUTORY PROCEDURE WHICH DEFERS CONSIDERATION OF AGGRAVATING AND MITIGATING CIRCUMSTANCES UNTIL AFTER A JURY HAS IMPOSED A SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS, BY PLACING THE TRIAL JUDGE IN A POSITION OF HAVING TO REDUCE A JURY-FIXED DEATH SENTENCE IF HE DEEMS THE DEATH PENALTY INAPPROPRIATE.

It is clear that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death". Woodson v. North Carolina, supra, 428 U.S. at 304. It is also clear that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause ...

24/ Defendants also submit that this provision of the statute is unconstitutional because it requires defendants to bear the risk of non persuasion at the sentencing hearing. However, because the Court must adopt one of the alternative courses listed above, it is unnecessary for the court to address this contention. See Lockett, supra, 57 L.Ed. 2d at 992, n. 16 (1978).

[because] [t]he defendant has a legitimate interest in the character of the procedure which leads to the imposition of sentence even if he may have no right to object to a particular result of the sentencing process". Gardner v. Florida, supra, 430 U.S. at 358 (plurality opinion). Any capital sentencing procedure, then, must assure "reliability in the determination that death is the appropriate punishment in a specific case", Woodson v. North Carolina, supra, 428 U.S. at 305 and it must comport with fundamental fairness, Witherspoon v. Illinois, 391 U.S. 510 (1968).

An Alabama trial judge comes to the "constitutionally indispensable part of the process of inflicting the penalty of death" only after a jury verdict has been publicly pronounced -- and publicized -- which sentences the defendant to die without consideration of mitigating circumstances. The judge is thus placed in the exposed position of having to override the jury's death sentence, and to take the public heat of "refusing to accept" a death sentence, in order to give the defendant the benefit of the sentencing hearing which is his constitutional due. Such a procedure is equivalent, at the sentencing stage, to beginning a trial on the issue of guilt or innocence by publicly proclaiming that the defendant is guilty and that a trial will now be held to determine whether he should be found guilty.

Indeed, Alabama's death-sentencing procedure is worse, because the pre-announced verdict of death carries the imprimatur of a jury of twelve citizens who, in public contemplation, appear to have sat in judgment on the case even though they have not in fact observed federal constitutional standards in fixing the sentence of death -- standards which require that the sentencing agency "consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed", Jurek v. Texas, supra, 428 U.S. at 271. A procedure which compels the judge to place himself in a publicly unfavorable light in order to do his minimal constitutional duty [25/] is too fraught with peril to be permitted consistently

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25/ Such a process embroils the judge in the passion of the day and forces him to "assume primary responsibility in choosing between competing political, economic and social pressures". Dennis v. United States, 341 U.S. 494, 525 (1951) (Frankfurter, J., concurring in affirmance of judgment).

with due process,[26/] and too unreliable to pass Eighth Amendment muster.

Justice Jones, in his dissent in Jacobs v. State, supra, 360 So.2d at 605, noted the "outcry of unjustified criticism attendant with a trial judge's reduction of a sentence to life imprisonment without possibility of parole, after a jury has returned a sentence of death".

> I call attention to the case of State v. Nolen, Circuit Court No. 7702059 (February 17, 1978), in which the trial Judge was made the object of voluminous public ridicule, including a resolution of condemnation by the State Legislature, numerous newspaper editorials and cartoons, Letters to the Editor, speeches, etc. To be sure, none of this criticism, to my knowledge, was based upon the merits of the statutory function of the judiciary; rather it was directed toward the "Unwarranted" tampering by a trial Judge with a jury verdict.

Id. at 650 n. 3.

Even if a judge were able and willing to disregard the jury sentence of death, the statute specifically instructs him to consider it. He is directed to weigh "the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury". § 13-11-4 (emphasis added). A system which so plainly "stack[s] the deck against" the defendant, Witherspoon v. Illinois, supra, 391 U.S. at 523, results in a distortion of "the balance of forces between the accused and his accuser", Wardius v. Oregon, 412 U.S. 470, 474 (1973). Where the defendant's life is at stake, it also ignores the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion", Gardner v. Florida, supra, 430 U.S. at 358.

Further consideration will be given below to the Eighth and Fourteenth Amendment violations in the instant case resulting from the trial judge's consideration of the jury's death sentence in his deliberations.

26/ Cf. Connally v. Georgia, 249 U.S. 245 (1977); Ward v. Village of Monroeville, 409 U.S. 57 (1972); Tumey v. Ohio, 273 U.S. 510 (1927). See also Gardner v. Florida, supra, 430 U.S. at 403 ("Florida argues that trial judges can be trusted to exercise their discretion in a responsible manner... However acceptable that argument might have been before Furman v. Georgia, it is now clearly foreclosed"); Johnson v. Mississippi, 403 U.S. 212 (1971).

V

THE STATUTORY PROVISIONS WHICH LIMIT CIRCUMSTANCES OF MITIGATION VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS BY PREVENTING THE SENTENCER FROM GIVING INDEPENDENT MITIGATING WEIGHT TO ASPECTS OF THE DEFENDANT'S CHARACTER AND RECORD AND TO CIRCUMSTANCES OF THE OFFENSE PROFFERED AS A BASIS FOR A SENTENCE LESS THAN DEATH.

The Alabama statute specifies seven narrowly defined factors which "shall be" mitigating circumstances[27] and which shall be weighed by the trial judge against the aggravating circumstances[28] to determine whether the judge will accept or refuse to accept the jury-fixed death sentence, §§ 13-11-3, 13-11-4. The mitigating circumstances deal with the defendant's prior criminal record[29], his mental state at the time of the commission of the crime[30], his age[31] and his participation in the criminal act which has resulted in his jury sentence of death.[32]

By the plain language of the statute, the trial judge is not permitted to weigh any non-statutory mitigating circumstance in reaching his decision.[33] Nor has the Alabama Supreme Court construed the statute to permit

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27/ § 13-11-7.

28/ § 13-11-6.

29/ § 13-11-7(1).

30/ § 13-11-7(2), (5), (6).

31/ § 13-11-7(7).

32/ § 13-11-7(4). The seventh mitigating circumstance deals with the rare situation in which the victim was a participant in his own death. § 13-11-7(3).

33/ All references throughout the statute are to the specific statutory mitigating circumstances. § 13-11-3 requires that the trial judge hear evidence relating to the specific statutory mitigating circumstances. § 13-11-4 requires that the court weigh "the aggravating and mitigating circumstances", and § 13-11-4(2) requires that a trial court support a death sentence by making written findings which shall at least include:

> (2) Any of the mitigating circumstances in § 13-11-7 which it finds insufficient to outweigh the aggravating circumstances.

Finally, § 13-11-7, in listing mitigating circumstances, contains the following limiting language:

> Mitigating circumstances shall be the following... (Emphasis added).

the consideration of non-statutory mitigating circumstances.[34] In sustaining its constitutionality, the court has relied instead upon the provision of § 13-11-3 which permits the introduction of evidence as to "any matter that the court deems relevant to sentence". Jacobs v. State, supra, 361 So.2d at 652-653.[35]

Thus, a defendant is permitted to offer evidence relevant to sentence; but under the terms of the statute, all such evidence must be considered in relation to the limited statutory mitigating circumstances.[36] This approach to mitigation is indistinguishable from that of the Ohio statute condemned in Lockett, which provided that the death penalty was precluded "when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of [three enumerated mitigating circumstances]... is established..." Ohio Rev. Code Ann. § 2929.04(B) (1975 Repl. Vol), quoted in Lockett v. Ohio, supra, 57 L.Ed. 2d at 991-2. Notwithstanding that the Ohio Supreme Court had construed this provision to mean that "the sentencing judge or judges may consider factors such as the age and criminal record of the defendant in determining whether any of the mitigating circumstances is established", id. at 2966, the Ohio procedure was invalidated because it prevented the sentencer "from giving independant mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation", id. at 2965 (emphasis added). The Court further noted that "[n]one of the statutes we sustained in Gregg and the companion cases clearly operated at that time to prevent the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor". Id. at 2966.

34/ In his separate opinion in Jacobs v. State, supra, 361 So.2d at 648, Chief Justice Torbert wrote that "[t]he list of mitigating circumstances in section 13-11-7, Code of Alabama, 1975, is exclusive...".

35/ "It is readily apparent, therefore, that Alabama's sentencing scheme broadly allows the accused to present evidence of mitigating circumstances." Jacobs v. State, supra, 361 So.2d at 652-652.

36/ In the recent case of Ex parte Recardo Cook (Re: Recardo Cook v. State of Alabama), SC 77-320 (Ala. Sup. Ct. Sept. 10, 1978), the Alabama Supreme Court described this shoehorning process as "categorizing the evidence received and balancing the aggravating circumstances with the mitigating circumstances".

Alabama's statute operates the same way. Therefore, the Court's decision in Lockett mandates a declaration that the Alabama statute violates the Eighth and Fourteenth Amendments.

VI

THE FAILURE OF THE ALABAMA DEATH PENALTY SCHEME TO PROVIDE A SYSTEM OF COMPARATIVE REVIEW OF SENTENCES AND TO EMPOWER THE APPELLATE COURTS TO VACATE DEATH SENTENCES IN APPROPRIATE CASES MAKES THAT SCHEME VIOLATIVE OF THE EIGHTH AMENDMENT'S PROSCRIPTION AGAINST CRUEL AND UNUSUAL PUNISHMENT.

In order to pass constitutional muster, a death penalty sentencing scheme must eliminate the arbitrary and capricious application of the death sentences, Furman v. Georgia, supra, 408 U.S. at 309-310 (Justice Stewart concurring). Such a scheme must provide a reliable system for determining that death is the appropriate punishment in a specific case. Presnell v. Georgia, supra; Woodson v. North Carolina, 428 U.S. at 305.

An important component of a reliable, and thus constitutionally acceptable sentencing scheme, is "prompt judicial review of the [sentencing]... decision in a court with statewide jurisdiction [as] a means to promote the even handed, rational, and consistent imposition of death sentences under the law. Jurek v. Texas, supra at 276. This appellate review is constitutionally necessary to "assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants", Gregg v. Georgia, supra at 204, and "to ensure that [death sentences]... are consistent with sentences imposed in similar circumstances", Proffit v. Florida, supra at 253. The Supreme Court noted with approval that the Georgia and Florida schemes provided for comparative review of death sentences to determine "whether the [death] sentence [in each case] is disproportionate compared to those sentences imposed in similar cases", Gregg v. Georgia, supra at 198,[37/] and to assure regular and even handed treatment of death sentences, Proffitt v.

37/ The Georgia appellate scheme for comparative review is extensive. See Gregg v. Georgia, supra, 428 U.S. 166-168; Id. at 223-224 (Justice White concurring). The court is required to compare "each death sentence with the sentences imposed on similarly situated defendants to insure that the sentence of death in a particular case is not disproportionate. Gregg v. Georgia at 198.

Florida, supra at 251.[38] An important feature of both systems of appellate review is the comparison of cases in which death is the sentence with cases wherein life sentences are imposed.[39]

A further feature involves the power of both courts to vacate death sentences in cases where the court affirms the conviction in order to prevent an arbitrary and capricious application of their capital punishment statute. As the Supreme Court noted in Proffitt,

> The Supreme Court of Florida like that of Georgia has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed it has vacated eight of the 21 death sentences that it has reviewed to date.

Proffitt v. Florida, supra at 253.

This dual appellate function of comparative appellate review of both death and life sentences, coupled with the exercise of their power to vacate inappropriate death sentences, provides a consistent, reliable method by which the judiciary may check the arbitrary and capricious exercise of sentencing power through a review of death sentences, Woodson v. North Carolina, supra at 303.

When the Alabama appellate review system in death cases is measured by the benchmarks of Gregg, Proffitt and Woodson, it falls far short of the constitutional standard. The Alabama death statute does not empower Alabama courts to exercise comparative proportionate appellate review or to vacate a death sentence in a case where the conviction is fair but where the death sentence imposed, as statutorily authorized, is excessive, arbitrary or

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38/ As the Supreme Court noted in Proffitt v. Florida, supra, 428 U.S. at 258-9, the Florida Supreme Court has adopted, without statutory requirement, a comparative proportionality review similar to that of Georgia. (Opinion of Justices Stewart, Powell and Stevens).

39/ See e.g. Gregg v. Georgia, supra at 219, n. 5 (Justice White concurring); See also Slater v. State, 316 So.2d 539, 542 (Fla. 1975), wherein the court remarked,

> We pride ourselves in a system of justice that requires equality before the law. Defendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same.

disproportionate when compared to the sentence in other cases.[40]

There appears to be no special procedure for comparative review of death cases, and the courts themselves do not demonstrate through their opinions that they are undertaking any sort of comparative review.

Review of convictions in death cases in Alabama is automatic.[41] Under the two tier Alabama appellate system, the first review is conducted by the Alabama Court of Criminal Appeals. To date, the Court of Criminal Appeals has issued opinions in 23 cases wherein the appellant had been sentenced to death.[42] They have affirmed 19 of the convictions and death sentences, reversed the convictions in four of the cases[43] and remanded two others for written factual findings and/or new sentencing hearings.[44] The court did not reduce or vacate any of the death sentences which came before it.[45]

It is clear from the Court's opinions that it does not exercise any sort of comparative review of the most minimal kind. It is also patently obvious that no attempt is made to compare death sentences to cases where life

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40/ The statute provides that the "judgment of conviction and sentence of death shall be subject to automatic review as now required by law". § 13-11-5. This provision clearly has reference to the Alabama Automatic Appeal Act § 12-22-241. There is no mention of comparative review. That act does not empower nor require the court to review the appropriateness of the death penalty in each case where it is imposed nor does it empower the court to vacate inappropriately awarded death sentences. Indeed, under present Alabama law the appellate courts of the state do not have any authority to modify or commute a death sentence properly imposed. Brown v. State, 288 Ala. 680, 264 So.2d 549 (1971); Liddell v. State, 287 Ala. 299, 251 So.2d 601 (1971). The Alabama Courts are to be commended for their adoption of the plain error rule, Ala. R. App. Pro. 39(K). The rule adoption, however, does not remedy the constitutional defect.

41/ The Alabama Court of Criminal Appeals, under § 12-22-150, automaticially reviews convictions in death penalty cases. Review in the Alabama Supreme Court is also automatic through writ of certiorari. Ala. R. App. Pro. 39(c).

42/ See Appendix D.

43/ Id.

44/ Id.

45/ It is interesting to note that the Florida Supreme Court vacated 8 of the first 21 death sentences that it reviewed. Proffitt v. Florida, supra at 253.

without parole is the sentence.[46]

In Jacobs v. State, 361 So.2d 607, 633 (Ala. Cr. App. 1977), the Court of Criminal Appeals discussed its review power, noting,

> Since the adoption of the Automatic Appeals Act in 1943, the Supreme Court of Alabama has reviewed approximately ninety-five death cases and has reversed 25 of them for various reasons including excessive punishment, and where the verdict was contrary to the great preponderence of the evidence.[47]

No mention is made of comparative review or of the power to reduce sentences in cases where the verdict is supported by the evidence but the capital sentence is inappropriate.

With the post-Jacobs cases, the Court of Criminal Appeals has dropped even this pretext of review. Their opinions reflect a perception that it is their function to review death penalty cases for error, not to exercise comparative review and vacate inappropriately brought death sentences. This perception is clearly a correct one under Alabama law. § 12-22-241. For example, in Case v. State, 4 Div. 640 (Ala. Cr. App., November 21, 1978) at p. 43, the court notes,

> We have carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none. Death is the penalty of the law, and the penalty is just.

In Bracewell v. State, 4 Div. 646 (Ala. Cr. App., January 30, 1979) at p. 30, the court states, "No error is reflected in the record and the judgment of conviction is affirmed". The court's other opinions contain

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46/ The court has reviewed at least 4 cases where life without parole was the sentence. In each of the cases, the crime as committed and the past record of the offender were bad, if not worse than cases in which death sentences were upheld by the Court of Criminal Appeals. See, e.g. Neal v. State, 6 Div. 894 (Ala. Cr. App. May 1, 1979), and the cases referenced in Appendix D.

47/ The cases the court cites for this proposition are Easley v. State, 246 Ala. 359 (1944) and Davis v. State, 245 Ala. 589 (1944). In Easley, and Davis, the court reversed a death penalty conviction because the "verdict was contrary to the great preponderance of the evidence". In neither case did the court compare the sentences or set aside the death sentence. The court simply reversed.

similar statements.[48] Thus, the Alabama Court of Criminal Appeals does not undertake the kind of comparative case by case review which Gregg and Proffitt require as a foundation for constitutionality.

This error is not corrected by the second case review which is conducted by the Alabama Supreme Court. That court has issued opinions in 9 death cases. Of those cases, 5 have been affirmed, 3 reversed and one remanded for further proceedings.[49] It has not vacated or reduced a death sentence by any of its decisions. These cases, like those decided by the Court of Appeals, reflect the court's clear belief that its function is to review cases for trial error rather than for proportionality, arbitrariness or excessiveness of sentence. In its most recent opinion, in Wilson v. State, 77-433 (Ala. S. Ct., April 20, 1979) the Supreme Court describes its review of cases.

> On original submission, this Court reviewed the opinion of the Court of Criminal Appeals and the proceedings in the trial court as provided for in Rule 39(K) and Rule 45 (A) Alabama Rules of Appellate Procedure, even though this cause was argued and submitted prior to the effective date of those rules.
>
> After reviewing the opinion and the proceedings, we do not note any plain error or defect in the proceedings which has or probably has adversely affected the substantive rights of the petitioner.

48/ In one case, Beck v. State, 7 Div. 560 (Ala. Cr. App., April 4, 1978) at p. 38, the court does mention that "The facts in this case, after a careful evaluation show a marked similarity with those in Jacobs v. State, supra". No comparison is made with other death cases or cases in which life without parole is the sentence. In another case, Thomas v. State, 2 Div. 238 (Ala. Cr. App., March 27, 1979), at p. 19, the court remarks,

> "...this court has carefully weighed the aggravating and mitigating circumstances independently.
>
> We are of the opinion that the punishment here imposed the crime for which appellant has been found duly guilty."

The court does not compare the sentence in Thomas with other non-death cases and upholds the sentence even though the court expresses "grave doubts" that the trial judge correctly found this killing to be heinous, atrocious and cruel. P. 19, n. 2.

49/ See Appendix E.

While the plain error review undertaken by the Alabama Supreme Court is clearly admirable, it, like the review of the Court of Criminal Appeals, is not the type mandated by Gregg and Proffitt.

Without a system of appellate review which permits a court to review sentences in light of the sentences in similar cases and allows the court to vacate death sentences which are excessive, arbitrary or disproportionate, no statutory scheme can be reliable. Even if this court finds that the Alabama sentencing procedures are constitutional, it should invalidate the Alabama death penalty law because it fails to provide for the constitutionally-mandated appellate review.

VII

THE ALABAMA DEATH-PENALTY STATUTES, AS APPLIED, CONSTITUTE A MANDATORY DEATH-SENTENCING SCHEME WHICH VIOLATES THE EIGHTH AMENDMENT'S PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT.

It is a point beyond cavil that a statute which is facially constitutional may nonetheless be applied in an unconstitutional fashion. See Allee v. Medrano, 416 U.S. 802 (1974); Shuttlesworth v. Birmingham, 394 U.S. 147 (1969); Wright v. Georgia, 373 U.S. 284 (1963); Yick Wo v. Hopkins, 118 U.S. 356 (1886). It is also beyond dispute that a capital sentencing scheme wherein the punishment of death is mandatory upon conviction is unconstitutional. Woodson v. North Carolina, supra.

In Woodson and Roberts, supra, the Supreme Court invalidated two state death penalty schemes which automatically imposed the death sentence upon conviction for certain offenses. They did so because mandatory death penalty schemes fail to provide for "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a death sentence" and "fail to make rationally reviewable the process for imposing the death penalty". Woodson v. North Carolina, supra at 303.

There is no doubt that the provision of the Alabama statutes requiring that a jury automatically upon conviction "fix the punishment at death", § 13-11-2(a), is even more mandatory than the statutes condemned in Woodson and Roberts and would be patently unconstitutional standing alone.[50/]

50/ Under the North Carolina and Louisiana schemes, lesser included offense charges were permitted and a lesser verdict could be returned. Roberts v. Louisiana, supra at 332.

However, the Alabama Supreme Court has found that the mandatoriness of the jury sentence is tempered into constitutionality by the fact that the trial judge reviews the mandatory sentence. Jacobs v. State, supra at 644. A review of the relevant statistics shows that Alabama trial judges have not tempered the statute's mandatory nature but rather have consistently acted as rubber stamps for the standardless jury sentence, thus making the statute in effect a mandatory one. Maintaining an 86% death sentence rate in Alabama capital punishment cases, the state obtains a death sentence in virtually nine out of every ten cases where it seeks one.[51/]

It is painfully obvious that the Alabama statute, as it is being applied, fails to provide the individualized consideration which is a constitutional requirement in imposing a death sentence. Lockett v. Ohio, supra at 990. Under the statute, as applied, there is no real consideration of the character and record of the individual offender and the circumstances of the particular offense. Woodson v. North Carolina, supra at 304. Rather, trial judges are simply ratifying the unguidelined mandatory sentences of death which Alabama juries must return. They are not, as the statistics plainly demonstrate, focusing their attention "on the particularized nature of the crime and the particularized characteristics of the individual defendant". Gregg v. Georgia, supra at 206.

Despite the protestations of the Alabama Supreme Court to the contrary, the Alabama system does not work in a constitutional fashion. There is no rational review of the judge's mandatory death sentence by Alabama trial judges, with the unconscionable result that the Alabama death sentencing scheme has, in application, become mandatory. The constitution will not tolerate such a scheme.

51/ The conviction rate is even more phenomenal. Of the 52 cases wherein defendants have pleaded not guilty, only two have been acquitted. This represents a 96% conviction rate.

VIII

THE TRIAL JUDGE'S CONSIDERATION OF THE JURY'S DEATH SENTENCE AS ONE OF THE AGGRAVATING CIRCUMSTANCES WEIGHED IN HIS FIXING THE PUNISHMENT AT DEATH VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

The opinion of the Supreme Court of Alabama affirming the judgment of the Court of Criminal Appeals contained a dissent by Justice Jones. (App. B., p. 2, infra.) Said dissent was based not only on the unconstitutionality of the Alabama death penalty statute, but also on the ground that the trial Judge improperly considered the jury's death sentence as one of the aggravating circumstances considered by him in his judgment fixing the punishment at death.

The final paragraph of the trial Court's sentencing order reads as follows:

> The Court, after considering all the evidence in the case and the circumstances of the offense, together with the character and propensity of the defendant, Clyde Cade, and after weighing the aggravating and mitigating circumstances and the punishment of death by the jury, finds the defendant, Clyde Cade, should be sentenced to death. (Emphasis added).

In explaining why he construes this as error, Justice Jones states:

> Here, the trial Judge forthrightly and candidly admits that one of the aggravating circumstances considered by him in his judgment of the death sentence was, "...and the punishment of death by the jury...". The apprehension voiced in my dissent in Jacobs, which I felt was an inherent and necessary incident in every case, is set out here in clear, unmistakable language. This sentencing order is susceptible of only one meaning: The Judge is saying that among those circumstances considered by him in exercising his discretion in favor of the sentence of death is the fact that a jury of twelve persons, in returning a guilty verdict, has already fixed the Defendant's punishment at death. True, we do not know how much weight he gave the jury's death sentence; but, surely, we cannot speculate that, had he given it no consideration, he would have reached the same conclusion. Indeed, it is just as reasonable to assume that his consideration of the jury's death sentence tipped the scales in favor of his judgment fixing the punishment at death.
>
> The majority of this Court in Jacobs said in effect that it would not assume, absent evidence to the contrary (as I admit I wrongfully did), that the

trial judges of this State would not honestly and courageously discharge the duties of their office in objectively weighing the aggravating and mitigating circumstances of each individual case uninfluenced by the mandatory jury sentence of death.

The reason the jury's verdict as to the sentence cannot constitute any part of the trial judge's consideration should be obvious. The jury's function is to determine the defendant's guilt or innocence of the capital murder charged in the indictment. For the verdict to go beyond this and fix the sentence at death as mandated by the Statute without the exercise of guided discretion brings the case squarely within the prohibition of Woodson.5/

If the jury cannot act, under these circumstances, as the ultimate sentencing authority (which it clearly cannot), then, surely, its sentence of death cannot serve as a consideration in guiding the trial court's search for, and application of, a nondiscriminatory test for determining who shall die and who shall live. Under our statutory scheme, the jury's sentence of death means only that the jury has returned a verdict of guilty. It would be ludicrous to suppose that under our Statute the jury will find guilty only those it feels should be put to death and discharge as not guilty all others charged under our Statute. To make such an assumption is, of itself, an acknowledgement of our Statute's unconstitutionality under the test of Gregg and Woodson.

The trial proper, in its unbifurcated context, has furnished the jury neither adequate data of aggravation and mitigation nor legal guidelines for the exercise of its guided discretion -- the very deficiency contained in Woodson. Moreover, the jury's discretion under our Statute is not to convict the defendant of the offense and then decide in a bifurcated sentencing hearing if he lives or dies; rather, its only choice (other than to disagree and mistry the case) is to discharge the defendant as not guilty or to convict him and sentence him to death. Therefore, to allow the trial judge to consider the jury's verdict of death as an aggravating circumstance in arriving at his ultimate judgment of the death penalty is to commit the same error -- or, more accurately, to commit the same error compounded.

5/ Woodson v. North Carolina, 428 U.S. 280 (1976).

CONCLUSION

The several features of the Alabama statute described in the preceding subsections of this brief do not, of course, function in isolation. They interact to produce a death-sentencing procedure of uniquely questionable fairness and reliability.

The Alabama legislature is not to blame in that the current statutory scheme was merely a response to Furman.[52/] Nevertheless, Alabama's capital punishment laws violate the Eighth and Fourteenth Amendments. Accordingly, they must be struck down.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

52/ The same was true of the Ohio statutory scheme, Lockett, supra, 57 L.Ed. 2d at 986-7, but the Supreme Court found such good intentions irrelevant to a determination of the statute's unconstitutionality.

79-5525

NOV 21 1978

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1978-79

4 Div. 640

Clyde Cade

v.

State

Appeal from Dale Circuit Court

HARRIS, PRESIDING JUDGE

The grand jury of Geneva County indicted appellant for the capital murder of L. D. Sizemore who at the time of his death was the Sheriff of that county.

The indictment was brought under the provisions of Section 13-11-2 - (a), (5), which reads as follows:

> "(5) The murder of any police officer, sheriff, deputy, state trooper or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job related act or performance of such officer or guard."

Omitting the formal parts the indictment alleges:

"Count 1

"The Grand Jury of said County charge that before the finding of this Indictment, Clyde Cade, unlawfully and with malice aforethought killed L. D. Sizemore, a sheriff,
to-wit: the Sheriff of Geneva County, Alabama by shooting him with a gun or pistol,

"Count 2

"The Grand Jury of Geneva County, Alabama further charge that before the finding of this indictment, Clyde Cade, unlawfully and with malice aforethought killed L. D. Sizemore, a sheriff
to-wit: the sheriff of Geneva County, Alabama, because of an official or job related act or performance of such officer,
to-wit: the arrest of the said Clyde Cade, by shooting him with a gun or pistol,

"Count 3

"The Grand Jury of Geneva County, Alabama, further charge that before the finding of this indictment, Clyde Cade did murder a sheriff, to-wit: L. D. Sizemore, the sheriff of Geneva County, Alabama, because of an official or job related act or performance, to-wit: investigating a complaint involving the said Clyde Cade, against the peace and dignity of the State of Alabama."

Appellant filed a motion for a psychiatric examination, alleging that he was unable to understand the proceedings against him and properly assist in his own defense. Following an evidentiary hearing, the Geneva County Circuit Court granted appellant's motion, ruling that he be examined at Searcy Hospital "for such length of time as is necessary to determine the mental condition of the defendant so far as it respects his criminal responsibility or competency to stand trial."

In compliance with the court's order, an examination of appellant was conducted. Officials at Searcy Hospital returned the following report to the court:

"October 21, 1977

"Honorable P. B. McLauchlin, Jr., Judge

"Circuit Court of Geneva County, Alabama

"Geneva, Alabama 36340

"RE: CADE, Clyde
Our File #11 29 45

"Dear Judge McLauchlin:

"We are writing with reference to Clyde Cade reportedly a 49 year old separated black male who was admitted to Searcy Hospital for the first admission September 14, 1977 under your commitment order dated the 13th day of September, 1977 with information that he was ordered committed to the State of Alabama, Department of Mental Health for such length of time as necessary to determine the mental condition of the defendant so far as it respects his criminal responsibility or competency to stand trial. It was further ordered that the officials of Searcy Hospital place Clyde Cade under observation and examination with the view of determining the mental condition of the defendant and the existence of any mental disease or defect which would affect his present criminal responsibility or his criminal responsibility at the time of the commission of the alleged crime.

"Post-admission evaluation, including physical examination, mental status examination, social history study, psychological examination, psychiatric evaluation and neurological evaluation, has been completed and we are submitting the following report of our findings.

"Psychological examination revealed an intellectual functioning level that falls within the low average range. Testing suggested some socio-cultural and educational deprivation and possible organicity. Mild deficits were noted in general information, vocabulary and comprehension. Memory, reasoning and abstraction were in the average range. Mild retardation was noted on tasks requiring visual-motor coordination. Testing for organicity revealed mild to borderline neurological deficits probably stemming from a history of trauma to head. Despite these mild deficits, the examiner reported that the patient has adequately compensated and his psychological functioning is not significantly impaired. Projective tests were suggestive of hostility, emotional lability and acting out tendencies. The examiner reported there was not much evidence for thought disorder or psychotic type of thinking disturbance. However, the examiner reported that the patient does show distrustful attitudes, and persecutory ideas and feels victimized. Personality data revealed a self-centered, passive-aggresive rebellious individual who apparently failed to learn socialized behaviors from earlier mistakes. Emotionally the examiner described the patient as shallow, immature and unpredictable. The examiner states that the patient feels easily slighted and may react with violence when his adequacy is threatened. The examiner states that the patient's capacity for guilt and remorse seems limited and that he is likely to project blame on others for his problems. His social judgment and insight into difficulties were thought to be less than adequate. His major defense mechanisms were denial, projection and acting out. Overall profile was suggestive of antisocial personality disorder with superficial passive-aggressive features. Due to the characterological nature of his coping, the examiner reported that prognosis is very guarded.

"Initial psychiatric evaluation revealed speech to be fairly low, fairly clear and of moderate speed. His affect was somewhat theatrical, labile and very euphoric. No aberrations of thought were evident although the patient stated that he hears voices and he said that this scares him and then he laughed broadly and glanced about the room, according to the report of the examiner. Reality contact appeared fairly good. Associations appeared quite tight and the patient appeared in control although there was profuse tangential verbal output. Sensorium appeared clear. Monetary calculations were fairly slow. Memory in general appeared to be extremely good as the patient gave explicit details but these were not corroborated. Proverb interpretations were fairly good. The examiner stated that it was very difficult to assess his insight at the time of the initial interview. Judgment by history was described as poor. Intellectual capacity appeared average or above although there was thought to be some socio-cultural deprivation. Diagnosis was deferred at the time of the initial evaluation and it was recommended that we refer the patient for a complete organic work-up.

"Neurological evaluation revealed a normal EEG and a normal skull x-ray. The neurological consultation impression revealed little evidence of any type of memory problem, according to the consultant neurologist. The consultant also reported that he was very skeptical that this man has any kind of post concussive syndrome which might account for actions which he would not remember and/or be responsible for. He states this is based on the fact that he does not have a good clinical picture for seizures, that he is having a spell every day but no seizure has been observed by the staff, and the fact that his EEG was so normal as to be called "normal normal" rather than just plain normal.

"Subsequent psychiatric evaluations were conducted October 6, 1977 and October 13, 1977. In the last evaluation it is reported by the consultant psychiatrist that the evaluating team has not been able to find any significant physical or organic problems in this patient and that the patient has shown normal and consistent reasoning and judgment. It is further reported that the patient appears to have fairly good recent and remote memory of all with adequate temporal sequence and that he also has good social awareness demonstrated here. A diagnosis of Antisocial personality with superficial passive-aggressive features has been made.

"Considering the above mentioned evaluation procedures, it was the opinion of the consultant psychiatrist in collaboration with the treatment team that Clyde Cade is sane, is mentally competent to stand trial, knows the difference between right and wrong and is able to cooperate and communicate with counsel in his defense. Therefore, he should be remanded to the legal authorities for further disposition of his pending charge.

"Our evaluation being complete, we are requesting that appropriate orders be issued to remand Clyde Cade to the custody of the Geneva County Sheriff's Department.

"With regard to Mr. Cade's criminal responsibility at the time of the commission of the alleged crime, we cannot make any definitive statement as this report reflects our evaluation from the time he was admitted to this hospital.

"Yours very truly,

"THE SEARCY HOSPITAL

/s/ Kay McLeod, ACSW
(Miss) Kay McLeod, ACSW
Director of Unit Administration

"APPROVAL: /s/ Jaime E. Condom, M.D.
Jaime E. Condom, M.D., Superintendent

"/Schwarzauer

"cc: Sheriff, Geneva County, Alabama
Geneva, Alabama"

On the basis of this report, observation and conclusions the trial judge ruled him competent to stand trial.

Appellant next filed a motion to quash the indictment on the ground that the grand jury was illegally drawn through a method intentionally excluding persons on account of race, sex, or income. Accompanying this motion were requests that the jury venire be quashed and that the jury rolls be produced for examination. These motions were subsequently withdrawn.

Appellant also filed a demurrer to the indictment and a further motion to Quash the Indictment. These motions are set out below.

"DEMURRER TO INDICTMENT

"Comes now the defendant and demurs to the indictment heretofore returned him in this cause, and as grounds for said demurrer sets out and assigns the following, separately and severally:

"1. No facts are averred in Count 3 of the indictment as to how and by what means the alleged murder was done.

"2. No facts are averred to show that the alleged conduct of the defendant was unlawful.

"3. No facts are averred in Count 3 of the indictment to show that the alleged conduct of the defendant was unlawful.

"4. No facts are averred to show that the alleged conduct of the defendant was done with malice aforethought.

"5. No facts are averred in Count 3 of the indictment to show that the alleged conduct of the defendant was done with malice aforethought.

"6. No facts are averred to show that the official or job related act or performance was an official or job related act of the offices allegedly murdered.

"7. No facts are averred in Count 3 of the indictment to show that one official or job related act or performance was an official or job related act of the offices allegedly murdered.

"8. The indictment does not state an offense.

"9. Count 3 of indictment does not state an offense.

"10. The averments of the indictment are unclear, uncertain, and indefinite.

"11. The averments in Count 3 of the indictment are unclear, uncertain, and indefinite.

"12. The indictment does not apprise the defendant of the charge against him.

"13. Count 3 of the indictment does not apprise the defendant of the charge against him.

"14. The time of the alleged offense is not averred in the indictment.

"15. The time of the alleged occurrence on which the charge made in the indictment is based is not alleged in the indictment.

"16. The place of the alleged offense is not averred in the indictment.

"17. The defendant is not sufficiently apprised of the charge against him to enable him to defend against it.

"18. The indictment is unconstitutionally vague.

"19. The indictment does not state facts in such a manner as to enable a person of common understanding to know what is intended.

"20. The indictment does not charge an offense in the words of any penal statute.

"21. The averments of the indictment are not sufficiently definite to inform the defendant of what he should be prepared to defend against him.

"22. The averments in Count 3 of the indictment are not sufficiently definite to inform the defendant of what he should be prepared to defend against.

"23. The indictment does not identify the offense charge.

"24. The indictment in Count 3 does not identify the offense charge.

"25. The indictment is not sufficiently definite and clear enough to enable the Court to pronounce judgement and pass sentence.

"26. The indictment does not meet the constitutional tests of clarity and definiteness.

"27. The indictment is not sufficiently specific in its averments to enable the defendant to prepare his defense.

"28. The indictment is not sufficiently specific in its averments to foreclose the possibility of the defendant being placed in jeopardy for the same offense.

"29. The indictment is not sufficiently specific as to protect the defendant from being again charged and placed in jeopardy for the same offense.

"30. The indictment does not contain sufficient information to enable the defendant to reasonably understand the nature of the offense.

"31. The indictment does not sufficiently inform the defendant of the nature of the charge against him.

"32. The indictment does not set out the elements of any criminal offense.

"33. The indictment in Count 3 does not set out the elements of any criminal offense.

"34. The indictment does not set out the elements of the offense charged against the defendant.

"35. The indictment in Count 3 does not set out the elements of the offense charged against the defendant.

"36. The indictment is null and void because the statute upon which Counts 2 and 3 are based is unconstitutional under the Alabama and United States Constitution, specifically the Eighth Amendment and the due process, equal protection and privileges and immunities clauses of the Fourteenth Amendment to the United States Constitution, and Sections 6, 7 and 15 of the Alabama Constitution of 1901."

* * *

"MOTION TO QUASH INDICTMENT

"The defendant above named, by and through his attorney, Myron H. Thompson, moved to quash the indictment on the grounds that:

"1. The statute (specifically Title 15, Section 342(3), et seq., Code of Alabama 1940, Recompiled 1958) upon which Counts 2 and 3 of the indictment are based, is in derogation and violation of the 8th and 14th Amendments to the United States Constitution and Sections 6, 7 and 15 of the Alabama Constitution of 1901, for the following reasons:

"(a) The provisions of the statute inflict cruel and unusual punishment upon the defendant.

"(b) The provisions require a mandatory imposition of the death penalty by the jury.

"(c) The provisions do not provide an opportunity for the jury to consider aggravating and mitigating circumstances.

"(d) The provisions do not provide the jury with an opportunity to participate in the penological phase of the criminal proceeding.

"(e) The provisions do not provide for a comparative appellate review of death sentences to insure that such punishment is not grossly disproportionate to the crime.

"(f) The death penalty is not a deterrent to the homicide allegedly committed by defendant, particularly becuase the mental incompetency of the defendant deprives him of the ability to conform his conduct to the requirements of the law.

"(g) Because the defendant is mentally deficient and cannot conform his actions to the requirements of the law, the death penalty as applied to him is so totally without penological justification, in that it results in the gratuitous inflection of suffering.

"(h) The statute as applied results in the discriminatory and arbitrary application of the death penalty."

Following the filing of these motions, appellant requested a change of venue, which was granted. The case was transferred to Dale County, Alabama.

Appellant then filed additional grounds for a demurrer to the indictment. They are set out below.

"ADDITIONAL GROUNDS OF DEMURRER TO INDICTMENT

"Comes now the Defendant and for additional grounds of demurrer to the indictment in this cause sets out and assigns the following, separately and severally:

"37. The indictment in Count I attempts to charge the Defendant with first degree murder, for which he could not be sentenced to death or to life imprisonment without parole, and in which lesser offenses could be included, and the indictment in Counts II and III thereof attempts to charge the Defendant under Chapter II of the Code of Alabama, 1975, with offenses for which death or life imprisonment without parole could be the only sentences, and which would not include any lesser offenses.

"38. The offense charged, or attempted to be charged in Count I of the indictment, and the offenses charged, or attempted to be charged in Counts II and III of the indictment cannot be included in the same indictment.

"39. The indictment does not aver any aggravating circumstances as required by Section 13-11-2, Code of Alabama, 1975.

"40. Count III of the indictment does not charge the Defendant with murder in the first degree under circumstances as set forth in Section 13-11-2(12), Code of Alabama, 1975.

"41. Count II of the indictment does not charge the Defendant with murder as required by Section 13-11-2 (5), Code of Alabama, 1975.

"42. The indictment does not charge the Defendant with any of the offenses enumerated in Section 13-11-2, Code of Alabama, 1975.

"43. The indictment is so vague and ambiguous that the Defendant is unable to determine whether he is charged with an offense for which the death penalty or life imprisonment without parole could be inflicted, or some lesser crime."

The trial judge sustained the demurrer as to Counts I and III and overruled the demurrer to Count II of the indictment. Appellant's motion to quash the indictment was denied. Additionally, appellant's request to be examined by a psychiatrist of his choosing at state expense, which was included in his motion for psychiatric examination, was denied.

Finally, appellant filed an additional motion to quash the indictment and an additional demurrer, both identically worded. The text of the motions in substance is set out below.

"1. The indictment as returned by the Grand Jury contains a misjoinder of offenses.

"2. The indictment as returned by the Grand Jury is duplicitous.

"3. The indictment as returned by the Grand Jury contains a misjoinder of offenses, in that Count I is for first degree murder, and Counts II and III are for offenses for which the Defendant can be sentenced to death.

"4. The action of the trial court in sustaining the Defendant's demurrer to Counts I and III of the indictment and overruling Defendant's demurrer as to Count II results in an arbitrary and capricious selection of an offense for which the Defendant could be sentenced to death, when the Grand Jury had also included in the indictment a Count in first degree murder for which the Defendant could not be sentenced to death.

"5. The action of the Grand Jury in returning an indictment containing both a Count in first degree murder and a Count setting forth an offense for which the Defendant can be sentenced to death (murder of a Sheriff because of an official or job related act or performance of such Sheriff) results in a delegation of authority to the trial judge or to the District Attorney to make a selection as to which Count the Defendant will be tried under, contrary to law and the Defendant's constitutional rights.

"6. The Grand Jury cannot delegate its authority to decide whether the Defendant will be tried for an offense for which he could be sentenced to death or for an offense for which he could not be sentenced to death.

"7. The actions of the trial court result in an arbitrary and capricious decision that Defendant will be tried for an offense for which he can be sentenced to death when the Grand Jury also charged the Defendant with an offense for which he could not be sentenced to death.

"8. The inclusion of a Count of first degree murder and a Count of murder of a Sheriff because of an official or job related act or performance of such Sheriff in the same indictment is contrary to the Alabama Death Penalty Statute and to the constitutional rights of the Defendant.

"9. The inclusion of a Count in first degree murder and a Count of murder of a Sheriff because of an official or job related act or performance of such Sheriff in the same indictment is contrary to the spirit of the Alabama Death Penalty Statute and the constitutional rights of the Defendant."

The Court's order on these motions is set out below.

"Comes the defendant, Clyde Cade, in his own proper person and through his attorney and files an additional demurrer to the indictment and an additional motion to quash the indictment and the demurrer and motion to quash having been submitted to the Court and the Court having considered the same and each ground thereof, the Court finds as follows:

"1. That the Grand Jury of Geneva County preferred a three court indictment against the defendant which alleged the following:

"(a) Count I. Clyde Cade unlawfully and with malice aforethought killed L. D. Sizemore, a sheriff, to wit: the Sheriff of Geneva County Alabama, by shooting him with a pistol.

"(b) Count II. Clyde Cade unlawfully and with malice aforethought killed L. D. Sizemore, a sheriff, to wit: the Sheriff of Geneva County, Alabama, because of an official or job related act or performance of such officer, to wit: the arrest of Clyde Cade, by shooting him with a pistol.

"(c) Count III. That Clyde Cade did murder a sheriff, to wit: L. D. Sizemore, the Sheriff of Geneva County, Alabama, because of an official or job related act or performance, to wit: investigating a complaint involving the said Clyde Cade.

"2. That Title 13-11-2, Code of Alabama, (1975) states as follows:

"(a) If the jury finds the defendant guilty, it shall fix the punishment at death when the defendant is charged by indictment with any of the following offenses and with aggravation, which must also be averred in the indictment and which offenses so charged with said aggravation shall not include any lesser offenses.

"(5) the murder of any police officer, sheriff, deputy, state trooper, or peace officer of any kind, or prison or jail guard while such prison or jail guard is on duty or because of some official or job related act or performance of such officer or guard.

"3. That on September 7, 1977, the defendant filed demurrers to the indictment and that the demurrers were sustained as to Count I and III of the indictment; that the demurrers were overruled as to Count II of the indictment and the defendant was arraigned and put to trial on Count II of the indictment.

"4. That the allegations set out in Count I characterized the aggravating circumstances as follows: killed L. D. Sizemore, a sheriff, to wit: the Sheriff of Geneva County, Alabama; that this language substantially followed the language of Title 13-11-2 (a), (5) of the above statute; that if the statute is broken down in sections according to the placing of the word 'or', the statute would read as follows: the murder of any sheriff, ... ; the murder of a prison or jail guard while such prison or jail guard is on duty; the murder of any sheriff, ... , prison or jail guard because of some official or job related act or performance of such officer or guard. This Court was of the opinion that in order to sufficiently express the aggravating circumstances in the indictment the Grand Jury not only had to allege that the deceased was a sheriff, but that he was on duty and murdered because of a job related act or performance. Therefore, the demurrer was sustained as to Count I in that it did not sufficiently state or express the aggravating circumstances even though if the statute is read as set out above the circumstances would be sufficiently alleged. In other words, the Court read the first section of the clause (5) with the last section of clause (5) and found that both had to be expressly averred before the aggravating circumstances were sufficiently set out.

"5. That the Court sustained the demurrer to Count III on the grounds that it failed to set out any means by which L. D. Sizemore was killed, that is by shooting him with a gun or pistol and that the Court was of the opinion that the essential common law of elements of first or second degree murder should be alleged rather than merely using the word 'murder'.

"6. The Court overruled the demurrer as to Count II and the defendant was arraigned on Count II and proceeded to trial on Count II of the indictment.

"7. That Count II of the indictment sufficiently alleges an offense and the aggravating circumstances as set out in Title 13-11-2, Code of Alabama (1975) and that said offense so charged with aggravation did not include any lesser included offenses.

"8. There is no question, in this Court's opinion, that in all three counts, the Grand Jury attempted to charge the defendant with the offenses and with aggravation as set out in Title 13-11-2, Code of Alabama, (1975) and the fact that certain counts of the indictment failed to so allege such offenses does not render the entire indictment demurrable and subject to motion to quash when one count of the indictment is sufficient to apprise the defendant of what he is charged with.

"9. This Court further finds that the Alabama Death Penalty Statute does not prohibit a multi-count indictment where in first degree murder and first degree murder for which the defendant can be sentenced to death are joined in separate counts in the same indictment. The requirement is that defendant must be charged in the indictment with one of enumerated offenses and with aggravation; the aggravation must be averred in the indictment; and the offense so charged with aggravation shall not include any lesser offenses. The offense as set out in Count II did not include any lesser offenses and did apprise the defendant of what he was charged with and the punishment therefor.

"10. That if Count I is considered as a count alleging first degree murder without any attempt to allege aggravating circumstances and it is joined with a count setting forth an offense with which the defendant could be sentenced to death, this in itself does not make the action of the Grand Jury contrary to the law of Alabama or repugnant to the Constitution of the United States. In Gregg v. Georgia, 428 U.S. 153, 49 L.Ed.2d 859, 96 S.Ct. 2909, the Supreme Court held that opportunity for discretionary actions that are inherent in the processing of a murder case does not render the statute or the procedure unconstitutional. The fact that the state prosecutor has unfettered authority to select the person with whom he wishes to prosecute for a capital offense and to plea bargain or that the jury may convict the defendant of a lesser included offense does not render the procedure or the statute unconstitutional.

"Therefore, it is ORDERED AND ADJUDGED that the additional demurrers to the indictment are overruled and the additional motion to quash is denied.

"This the 13 day of March, 1978."

At arraignment, in the presence of appointed counsel, appellant entered pleas of not guilty and not guilty by reason of insanity to the charge against him. The trial court ordered that appellant be provided a copy of the list of names of the persons constituting the venire for trial and that he be supplied a copy of the indictment.

The jury found appellant guilty and fixed his punishment at death. The trial court conducted a sentencing hearing following the trial and adjudged appellant guilty, sentencing appellant to death. A summary of the evidence at trial, the evidentiary sentencing hearing, and the trial judge's written findings following that hearing are set out below.

C. L. Rayburn testified that he was a Toxicologist III for the Department of Toxicology in the area of death investigation. His employment began in 1962 and since that time Rayburn participated in over 2,000 autopsies. Educational qualifications of Rayburn included a Bachelor of Science degree from Auburn University, in chemistry and bio-chemistry, a Master's degree in Toxicology with a minor in pharmacology, and medicinal studies in requirement for a Ph.D. Rayburn did not specify the area in which the Ph.D. was to be earned.

On the night of August 3, 1977, Rayburn received a call to come to Geneva, Alabama. He arrived there at 1:00 a.m. the morning of August 4. At that time Rayburn performed an autopsy on the body of L. D. "Red" Sizemore at the Pittman Funeral Home in Geneva.

Rayburn's examination of Sizemore's body revealed five or possibly six gunshot wounds. Testimony concerning the recovery of projectiles and their path through Sizemore's body is set out below.

". . . . I removed from the body four projectiles, or bullets, and portions of a fifth. I found a projectile entered on the left side of the face in front of the left ear. This projectile, or bullet, passed downward and toward the rear. It went beneath the cranial cavity beneath the brain, and struck the first neck vertebra; or neckbone. At that location it severed the spinal cord, then passed rearward into the soft tissues - - muscle tissues into the back of the neck, from whence I recovered it. I found another projectile entered on the left-front of the face through the lower jaw; or mandible. It passed in an upward direction going through the teeth and the left-front of the face, also extracting some of the teeth on the upper jaw, and then exited through the upper lip, making a laceration below the nose. The projectile then entered the nose on the right side, and exited the nose. In that case, I got small portions of metal; or portions of the projectile both from the bone on the left side of the jaw, and also from around the upper lip, in the jaw area. I also found a projectile entered below the mandible below the lower jaw on the left side, more to the rear, away from the front, and posterior to the one I just described. It passed through the soft tissues beneath the jaw. It passed through the tongue, then also it struck some of the teeth on the right side; upper portion of the jaw, then entered the right cheek bone from whence the projectile was recovered in the right cheek area. I also found a projectile entered on the left side of the neck just above the shoulder area. It passed through the soft tissues of the neck, and entered on the right-bottom portion of the brain. It passed through the portion of the brain in an upward direction toward the right top of the head, frontal area, where I noted a raised and red contused looking area on external examination. The projectile struck the bone inside, protruded the bone outward, and then ricocheted toward the top middle of the brain, from whence the projectile was recovered. I also found a projectile entered the left shoulder; upper portion of the left arm on the outside area. The projectile passed through the soft tissue of the bone - - I mean the arm on front of the bone, it exited in front of the left armpit area, then reentered the left chest in this left armpit, or axilla area. It passed through the soft tissues of the left chest, struck the left 4th rib; where it fractured the rib, the bullet then continued through the soft tissues beneath the skin and external to the rib cage, and the sternum or breast bone, to the right-front of the neck, where on external examination there was a red and bruised or contused and swollen area. Examination revealed a projectile to be located in that area, and from that area it was recovered. In addition, either a sixth projectile, or one of the five which I just described, struck two fingers of the left hand. It passed on the back of the second knuckle, the left index finger which reflected an injury. It also went in and out of the second knuckle of the left middle finger. I believe, sir, that consisted of the wounds I found on the body both on dissection and external examination."

In Rayburn's opinion Sizemore died from a massive central nervous system trauma to the brain, spinal cord and hemorrhage associated with the gunshot wounds to the body. The projectiles removed from Sizemore's body were given by Rayburn to criminalist John McDuffy.

John McDuffy testified that he was a criminalist with the Alabama Department of Toxicology and Criminal Investigation. McDuffy's qualifications included a Bachelor of Science degree in chemistry from Emory University and a Ph.D. in chemistry from Auburn University. Additionally, McDuffy trained at the Alabama Department of Toxicology and Criminal Investigation under the direction of Chief Toxicologist Dr. C. J. Rehling and Carl Rayburn, Assistant Director.

During the early morning hours of August 4, 1977, McDuffy received some projectiles from Rayburn. Subsequently, he received a pistol, containing six spent cartridges, from criminalist Dale Carter. Ballistics tests run on this weapon determined that two projectiles recovered from Sizemore's head and neck were fired from this weapon. Other projectiles were too mutilated for comparison to test-fired projectiles. A projectile subsequently received from Dale Carter was also determined to have been fired from the weapon McDuffy tested. Swabs taken from a subject's hands revealed the presence of lead, barium, and ammonia, indicating that a weapon had been discharged or handled recently by that person.

McDuffy testified further that the projectiles recovered from Sheriff Sizemore's body were taken in his presence at the funeral home.

Dianne Butts testified that she saw appellant at her house on August 3. With her were her children and her nieces and nephews. Appellant opened the door to the house and asked where Dianne's sister, Shirley, was. Ms. Butts told appellant that he could not come in because Shirley was not at home. When told this, appellant replied, "I'm going to kill her," opened a pocketknife, and was pushed outside the door by Ms. Butts.

Appellant then began pulling on a window screen outside. Ms. Butts threw a drink bottle through the window, shattering the glass and striking appellant.

Ms. Butts' sister then returned. Appellant, holding a "piece of board", said he was going to knock out the windshield of the car if Shirley did not get out of it. Ms Butts told her sister to go get the police and Shirley left the scene, returning shortly thereafter.

A short time later Sheriff Sizemore drove up and talked with Ms. Butts. Following this conversation, the Sheriff called to appellant. From the record:

> "Q. All right. He called Clyde out of the house. How did he do that?
>
> "A. He just said, 'Come here, Clyde', and Clyde come on out saying, 'I ain't going nowhere. I ain't going to jail, I ain't going to jail.' And Clyde was leaning against the police car, with his hands on the hood just like that there (witness indicating), and Sizemore said, 'Turn around and let me search you', and Clyde said, 'I ain't going to jail, I ain't going to jail', so he did just like that there, and started searching Clyde, and went in his pockets and stuff, and after he got through, he said, 'Clyde, you're under arrest,' and Clyde said, 'I ain't going to jail.' He searched him and opened the car door, and about that time, Clyde grabbed him around the waist and they fell. The next thing I know, Clyde had came up with the gun, and he had - - he told him to leave, and Sizemore throwed up his hands and said, 'Okay, I give up.' He got in the car and about that time, the next thing I know, there was some shots.
>
> "Q. All right. Who said they 'give up'?
>
> "A. Sizemore say he give up.
>
> "Q. And he got in the car?
>
> "A. Yeah.
>
> "Q. And then you heard the shots?
>
> "A. Yes, sir.
>
> "Q. Did you see who had the gun?
>
> "A. Yeah, Clyde had the gun."

"A – 17 was not filed with the Court. This entire

opinion, however, may be found at 375 So. 2d 802."

went to L. C. Thomas' house and returned. Ms. Johnson went inside the house when her sister told her to get out of the car, and appellant followed her, after a brief struggle out in the yard. There they remained until Sheriff Sizemore arrived.

Ms. Johnson was standing in the kitchen door when the appellant went outside in response to Sheriff Sizemore's call. Ms. Johnson's further testimony substantially corresponded to that of Diane Butts.

Willie May Key testified that she was the mother of Dianne Butts and Shirley Johnson and that she knew the appellant. On the day Sheriff Sizemore was shot, Mrs. Key first saw the appellant at Red Brockton's store, when her car was towed there. When her car was towed home, appellant rode on the hood of it. Mrs. Key did not see the appellant again until Sheriff Sizemore drove up. At that time, watching from her kitchen, Mrs. Key saw appellant approach the sheriff at his car and force him to the ground. Appellant rose up with the sheriff's gun and then Mrs. Key "saw blood and . . . started hollering, so that's it."

L. C. Thomas testified that he was a part-time auxiliary deputy sheriff for the Geneva County Sheriff's Department. On August 3, 1977, Thomas received a complaint about appellant from Shirley Johnson. As a result of this Thomas relayed the complaint to the Sheriff's Office. At some later time Thomas was informed that Sheriff Sizemore had been killed by appellant. Thomas then drove to the Key house, parking behind the Sheriff's car. Appellant was standing at the car pointing a pistol at Thomas. When Thomas approached Sheriff Sizemore's car, appellant ran around the back of the Key home. Thomas did not see appellant again until he was put under arrest.

Frankie Lindsey testified that he was Chief Deputy for the Geneva County Sheriff's Department. About ten minutes till seven o'clock on the evening of August 3, 1977, Lindsey received a call to proceed to the Key community. When Lindsey

arrived at the Key home, he recognized Sheriff Sizemore's car parked out front and L. C. Thomas standing beside it. Lindsey approached the car and saw Sheriff Sizemore slumped over the front seat.

At this time, Lindsey saw appellant standing by Dianne Butts' home and told him to stop; that he was under arrest. Appellant turned around and escaped through some woods in back of the house. Lindsey next saw appellant when he was brought out of his house by other law enforcement officers.

On cross-examination, Lindsey testified that he had arrested appellant on three occasions in which drinking was involved. While appellant had not acted normal at those times, neither had his conduct been strange. Lindsey was not aware of any warrant issued for appellant's arrest other than the one for Sheriff Sizemore's murder. At the time of appellant's arrest for the shooting, appellant was cursing but he said nothing further after he was put in a police vehicle. After he was put in jail Lindsey went to see him and was present when his rights were read to him.

Wade Garrett testified that he was employed by the Alabama Bureau of Investigation as a latent fingerprint examiner. Garrett's qualifications included training in fingerprint classification at the State Police Academy from which he graduated, five years of classification and identification training from J. B. Jolly, a former State Identification officer, and three years of advanced training in latent fingerprint work from R. G. Whitten, a present identification officer with the Bureau.

On August 4, 1977, Garrett took appellant's fingerprints and examined an automobile that had the Geneva County Sheriff's emblem on it. At that time Garrett lifted latent prints from the windows of that car. A print in what appeared to be blood was lifted from the inside of the passenger door window, six inches from the top and ten inches from the back side of the window.

Garrett compared this print with a sample taken by him from appellant and discovered nineteen characteristics common to the two prints. In Garrett's opinion the print left on the Sheriff's car was that of appellant, "and could have been left by no other finger."

Allen Benefield testified that he was Chief of the Ozark Police Department. On the evening of August 3, 1977, Benefield received a call to go to the aid of an officer, and proceeded to Geneva County along with Captain Murray Franks and Lieutenant John Nicholson. After arriving at the scene of Sheriff Sizemore's death, a young black female led Benefield and three other officers to appellant's home. These law enforcement officers surrounded the house and called appellant to come out. They called him several times identifying themselves as officers. When the officers received no reply, but heard movement from the living room, they entered the house and found appellant lying down in a bedroom. A revolver lay underneath his head. After securing the weapon, which held six expended cartridges, Benefield turned it over to Deputy Jimmy Hand of the Geneva County Sheriff's Department.

On cross-examination, Benefield testified that appellant appeared to be intoxicated, noting that he had to be gotten onto his feet by officers. Benefield further testified that appellant was bleeding from his face at the time he first saw him.

Dr. William H. Rudder testified that he received a medical degree from Birmingham Medical School in 1952, interning in Mobile City Hospital through 1953, when he established a general practice in Jackson, Alabama. In 1970, Rudder undertook a residency in psychiatry in Birmingham, completing the program in 1973. Subsequently, Rudder was employed at Veterans Hospital in Tuscaloosa, Bryce Hospital, engaged in private practice and became a Staff Psychiatrist at Searcy Hospital. At the time of his appearance in court, Rudder had been on the "legal Unit" at Searcy for four years. During his work at Searcy, Rudder evaluated several hundred criminals, including the appellant.

Appellant was diagnosed as an antisocial personality with superficial passive aggressive features. The definition of this personality disorder utilized by Rudder follows. From the record:

> " . . . . I could - - I would like to read what the book, or what I call the catalogue says about an antisocial personality. I think its definition of passive aggressive is a little confusing but I'll read that too if you would like to hear it, but we just said he was antisocial with superficial passive aggressive features, and that's the best short description we could come up with. 301.7; antisocial personality, 'The term is reserved for persons who are basically unsocialized and whose behavior pattern brings them repeatedly into conflict with society. They are incapable of significant loyalty to individuals, groups, or social values. They are grossly selfish, callused, irresponsive - - irresponsible, impulsive, and unable to feel or learn from their experience and punishment. Frustration tolerance is low.' They don't tolerate frustration very well. 'They tend to blame others, or offer pausable rationalization for their behavior. A mere history of repeated legal or social offenses is not sufficient to justify this diagnosis.' Passive aggressive is very short, it is No. 301.81, it is new to this book, this book changes every now and then because we realize it is not totally adequate and we try to improve it. Passive aggressive personality; 'The behavior pattern is characterized by both passivity (I guess everybody knows what passivity is, it's just inactivity or not being assertive, or not being aggressive) by both passivity and aggressiveness. The aggressiveness may be expressed passively, for example, structionism, pouting, procrastination, intentional inefficiency, or stubborness. This behavior commonly reflects hostility which the individual feels he dare not express openly.' We very frequently do that to our parents or someone who is related to us, that we cannot tell directly what our true feelings are. 'Often the behavior is one expression of the patient's resentment in failing to find gratification in a relationship with an individual or institution upon which he is over dependent.'"

Further, Dr. Rudder expressed the following opinions on appellant's mental condition. From the record:

> "Q. All right. What is your diagnosis of Mr. Cade?
>
> "A. Antisocial personality.
>
> "Q. All right. Does that mean that he's mentally ill?
>
> "A. No. That's a personality disorder.

"Q. Do you think, based on your observations and consultations and all that you have described, that he was insane at the time of the commission of the crime, and at the time that he shot the Sheriff?

"A. In my opinion he wasn't insane, but I wasn't there. I don't know what his condition was, and it's my - - it's our opinion, and we see people all the time that we feel both ways, you know, and all we can do is have an opinion. It was my opinion, and it was all of our opinions that he was sane at the time.

"Q. That was the board's decision?

"A. Right.

"Q. Well, was the board's thinking that he was under extreme - - was he under the influence of extreme mental or emotional disturbance at the time he committed the crime?

"A. Well, that's a relative thing. I get emotionally disturbed and everybody in the court has been emotionally disturbed, but there is no indication on everything we could find out; and we found out a good bit about this man, that he had any more inclination to pull a trigger than any other person. There is no reason to believe that he lacked control or that he was more impulsive. I would say that he is not more impulsive, because he - - I don't know how the courtroom would stack up, but there are probably some impulsive people in here who would break a vase or do something like that. There is nothing in his psychological makeup to indicate that he had a degree of impulsivity which would render him unable to control, or unable to recognize the consequences of his acts.

"Q. Now, do you think, in your expert opinion, that he had the capacity to appreciate the criminality of his act, or to conform his conduct to the requirements which was substantially impaired?

"A. Would you repeat that?

"Q. All right. Do you think that he had the capacity to appreciate the criminality of his conduct on the occasion when he shot the Sheriff, or to conform his conduct to requirements of law?

"A. I think he had the capacity. That's my opinion.

"Q. All right. Do you think that he was under an irresistible urge at the time that he committed the crime?

"A. I don't think he was under irresistible urge. That's my opinion.

"Q. Do you think that he was sane at the time that he committed this act?

"A. It's my opinion that he was sane.

"Q. Do you think that he knew the difference between right and wrong, and that he appreciated the criminality of the conduct at the time?

"A. It's my opinion that he did know the difference between right and wrong, and could appreciate the criminality of his conduct.

"Q. In other words, he had the ability to choose the right from the wrong?

"A. Yes."

Dr. V. Kothandapani testified that he was a native of India and that he obtained a bachelor's degree and master's degree in psychology in his country. In 1970 Kothandapani earned a Ph.D. degree in psychology at the University of North Carolina in Chapel Hill. After that time, Kothandapani held positions at Franklin College in Indiana and in private practice. At the time of his appearance in court concerning the case at bar, Kothandapani had worked at Searcy Hospital for two years, evaluating persons with criminal charges against them. Including appellant Kothandapani evaluated approximately two hundred to two hundred and fifty such persons in those two years.

Dr. Kothandapani performed eleven different evaluation tests upon appellant. On the basis of his testing and experience, Dr. Kothandapani formed the following opinion. From the record:

"Q. All right. Based on your tests and experience and talking with him, do you think he was insane at the time he committed this crime of shooting the Sheriff?

"A. Now, this is something we - - I have to give an educated guess, because as you know pretty well, I was not at the scene of the crime. Even if I were there, I would never know, because what goes on in another man's head is really difficult to assess. But, from the testing data, from the facts, from the interview I had with the patient, and from seeing hundreds of criminals, and also capital murder cases, I would say that the person acted violently and that he was aware of the - - he was aware of what he was doing because of the personality features. I'm basing it on the personality features. So, if I were to take an educated guess, if I were to give an expert opinion on this regard, it would be that he was not insane at the time this happened - - this alleged crime happened.

"Q. All right. Now, based further on your testing, do you think he was under the influence of extreme mental or emotional disturbance at the time he committed the crime?

"A. Again, this would be in terms of my educated guess, or expert opinion, that he would have been under some emotional distress. Any time you get into a fight; even a simple street fight, your emotions are aroused, you become angry, but the extent to which it goes, the intense emotion that we are talking about, does not qualify for what you just now said. He is not that emotionally disturbed as to - - as not to know what he was doing.

"Q. Well, do you think his capacity to appreciate the criminality of his contact - - conduct, or to conform to the requirements of law were substantially impaired at the time he committed this crime?

"A. I don't think it was substantially impaired. Again, based on the personality data, I would say that it was not the capacity to appreciate the criminality of the offense - - was not substantially impaired.

"Q. Do you think he was under an irresistible urge to do that which he did when he committed this crime?

"A. I don't think so.

"Q. All right. Now, based on your experience and knowledge in this field, would you say that Clyde Wade was sane at the time he shot the Sheriff?

"A. In all probability, yes.

"Q. And do you think he knew the difference between right and wrong at the time that he did that?

"A. In all probability, yes.

"Q. And do you think that, even though he did know right from wrong, that he could have chosen right from wrong at the time he committed this crime?

"A. I think so."

Larry D. Baxter testified that he was a police lieutenant in Enterprise, Alabama. On August 3, 1977, Baxter proceeded to the Key community, arriving there at approximately 7:30 p.m. Baxter and other law enforcement officers conducted a search for appellant and found him in an unpainted wood frame house two or three-tenths of a mile away from the scene of Sheriff Sizemore's death. After surrounding the house, and getting no reply from appellant when summoning him out of the house, Baxter entered the house, finding appellant lying on a bed, a pistol lying under the left side of his face. Baxter put appellant under arrest, reading him his "rights." Appellant appeared to have been drinking, but he was not "stumbling drunk."

Jimmy Hand testified that he was a drug investigator for the Gervais County Sheriff's Department. On August 3, 1977, Hand went to the Key house, arriving there at approximately 7:00 p.m. From there, Hand accompanied Chief Benefield, Baxter, and other law enforcement officers to appellant's house. After appellant's arrest, Chief Benefield gave him a revolver which was recovered from appellant. Hand testified that he subsequently gave this weapon to Dale Carter after initialing it. Hand's testimony concluded the State's case.

Out of the presence of the jury, appellant moved to exclude the State's evidence on the ground that a prima facie case had not been established. Additionally, appellant argued that the State's evidence failed to show that Sheriff Sizemore could not have legally arrested the appellant. From the record:

> "MR. HUGHES: Now, the State put in the indictment the allegations that the official act of the Sheriff was making the arrest of Clyde Cade. There has been testimony from a Chief Deputy that there was no warrant for the arrest; or none that he knew of, and that he was familiar with the records. There has been no proof of anything that would justify an arrest without a warrant. L. C. Thomas testified that he simply called someone, and that the jailor, trustee, or someone at the jail told him that there was a disturbance at the Key residence - - or the Key community. There is no evidence at all about how the Sheriff got the information. There is no evidence to indicate that Clyde Cade did anything in the Sheriff's presence. The rule being, of course, that to justify an arrest without a warrant for a misdemeanor, it must be committed in the presence of the officer. On the contrary, the evidence was clear that Clyde Cade was in the house, and that the Sheriff called him out and told him that he had to come with him. The girls testified that he told him that he was under arrest, but Clyde had done nothing in his presence. The evidence is that nothing had been reported to the Sheriff. Even if we wanted to stretch a point, nothing had been reported to the Sheriff that would justify an arrest. We feel, of course, that the indictment contemplates a lawful arrest. It it was not a lawful arrest, then the Sheriff was not acting within the line and scope of his duties as a Sheriff, in the going up and making of ... unlawful arrest. We feel that even though the girls have said that he told him he was under arrest, that there was no basis for a legal arrest, and that would have to be contemplated in the indictment, and that there is a fatal variance in this regard."

The court denied appellant's motion to exclude the evidence.

Appellant testified that he was either thirty-nine or forty-nine years of age, and that he had lived in Coffee Springs as a child. After getting "lost" a few times appellant was discharged from military service under honorable conditions. At one time, appellant had been restricted to a military hospital at Fort Rucker. This occurred after going "AWOL" over some trouble in Quincy, Florida. From the record:

"Q. What kind of trouble was it?

"A. Well, I got in a misfortune there with a guy over shooting pool, and some other things that he said, and messed around and done something to him. I wound up down in the county prison camp.

"Q. What did you do to him?

"A. Well, they say I messed him up, I don't know if I did or not.

"Q. Well, did you beat him up, or did you kill him, or what did you do?

"A. So they say, I don't know.

"Q. What do they say?

"A. They is some say I killed him, some say I beat him up, I don't know if I did or not, you see.

"Q. Do you remember anything about it?

"A. Well, my last recalling of it - - the shooting game at the pool table, you know - - I used to be pretty good at shooting pool. The guy come to me and he said, 'Well, you done won all my money. Give me some of my money back.' I said, 'You get to the table to win my money?' He said, 'Yeah.' Then I said, 'Well, it went a little different, I won it.' And he said, 'You ain't going to give it back to me?' and I said, 'Uh-huh.' Then he made the remark that I had took his money and I had took his woman also. Then he got to describing the womens to me, you know, - - two womens at the time, that I had been with that night, you know, that he was getting at me about. So, he got to calling the names, and this particular girls that he said was Shirley. Well, I know she was on my car that night.

"Q. Are you talking about the Shirley that was here and testified?

"A. That's right.

"Q. And this was down in Quincy, Florida?

"A. That's right.

"Q. All right.

"A. And so he opened a knife at me, and I kept jabbing him with that pool stick until I got him to one of the windows. I kept jabbing and he fell out the window. Well, I didn't realize that we was upstairs, you know, so I went back to shoot pool.

"Q. He fell out of the upstairs window?

"A. Yeah, that's right. So all of a sudden, officers come and arrested - - you know, asked if we was having a disturbance up there, and everybody pointed their finger over at me."

Appellant further testified, all on direct examination, that he had several other prison terms for various "trouble" he had been involved in. These offenses included theft and leaving the scene of an accident.

On the day Sheriff Sizemore was killed, appellant remembered having sat on David Key's porch. He also remembered speaking with L. C. Thomas that morning. There was a disagreement over money which appellant believed Thomas owed him for some work he had done.

Appellant also testified that he had been in an automobile accident. From the record:

"Q. About how long ago? About how long prior to the time that the Sheriff was killed?

"A. In other words, I don't know, but it was before he fired me. It was before he fired me, I think.

Q. Before he fired you?

"A. Yeah.

"Q. Were you hurt in any way in the wreck?

"A. Well, to tell you the truth, I just never could get myself together after that - - that jar or something done something to me.

"Q. Well, did you get hit by anything, or did your - -

"A. I ram up against that truck part there, and up that steering wheel and all, up there in my face, and hit this other truck.

"Q. How did the accident happen?

"A. Well, coming around a curve there by Wyley (PHON) Road - - a pretty stiff curve, and you can't see around it no - -

"Q. Clyde, I don't really mean all the details of it, but did you run into another vehicle?

"A. We both run head-on.

"Q. All right. Now, you say it bumped you against some parts of the truck and the steering wheel. What part of your body hit what part of the truck or the steering wheel?

"A. Mostly here; it hit me up beside the head there a little too, and I never was able hardly to get back to myself. It upset me some way or another there.

"Q. In what way?

"A. In other words, I got where I would go in places and I wouldn't know nothing about it. I would find myself sometimes walking in the rain down that railroad over there, and I don't know."

In addition to this injury, appellant testified that he had been in other accidents and that he had received other head injuries, mostly during fights, from "folks been bumping (him) about the head . . . ." Every morning appellant took a teaspoon of "yellow root and gin" to dull the pain he had in his head.

Appellant knew Sheriff Sizemore "quite a while." On several occasions the Sheriff had arrested appellant for drunkenness. Appellant described one of these arrests. From the record:

"Q. What were those arrests for?

"A. Well, mostly it would be drinking. So one time he arrested me - - I think he was Deputy then, and he come to arrest me down there at Bellwood one time in a little old cafe down there. So moonshine was in the progress pretty good then, and I was hauling it and doing everything else, and making it too. So D. T. walked up to me and said, 'Well, Clyde you ain't drinking, that's the first time.' I said, 'No, sir.' And he said, 'Well, there is a time when everybody quits,' and he said, 'Yeah, I'm going to mark that down when I get back that you ain't drunk.' So, he just walked off the - -

"Q. That was D. T. Braxton (PHON)?

"A. That's right. And about that time, Mr. Sizemore come up and looked at me, and - - well, the words you see, I wouldn't like to say them among these people here. But he said, 'Yeah, hell, you drunk.' And I said, 'No, I ain't neither.' And he slammed the handcuff on that arm, you know, and I said, 'Man, what's a matter with you?' And I said that, and he reached and got his old 'whip stick,' you know, to whip me with. He hit me a couple of times and I took it away from him.

"Q. He hit you with a stick?

"A. That's right. So, if it hadn't been for Mr. D[illegible]., he probably would have blowed my head off then. He told me to my face then - - 'I'm going to tell you just like he said it; excuse me for saying it, but I'm going to tell you just like he said it. He said, 'You're one damn nigger that if I ever get the chance, I'm going to kill you.' So I remembered that, and every time I would get around him, he would refresh my memory of this thing. I got to where I wouldn't hardly go to town - - wouldn't hardly go to my mother's on that account."

According to appellant, Sheriff Sizemore told him similar things on several occasions. However, appellant remembered few of the circumstances surrounding the fatal incident. From the record:

"Q. Did you get into a squabble up there with Dianne Butts?

"A. I don't remember that either.

"Q. Do you remember picking up this two-by-four, or whatever it was, and trying to knock the - -

"A. No, I don't.

"Q. All right. Do you remember when the Sheriff came up there?

"A. I remember him calling me, and I walked out to the car where he was, and it just seemed like it was a dream - - like I just could hardly see him.

"I believe I was out there on that porch with my head down. I might have been in the place with my head down. But I had my face in my hands and somebody kept calling me. I looked up there and there was a car with a blue light on it, and I got - -

"Q. Was the light on?

"A. No, it wasn't on, it was just on top of the car. And I walked out there where he was, and I walked up to the car to see if it was him. So, he said, 'Clyde, what the heck you doing up here raising hell?' I said, 'Raising hell? How in the world could I be raising hell with all these young ones around here?' He dropped his hand like that, and I was wondering what he was doing with it. I looked back at the house to see if anybody was looking, because I knowed what he said he was going to do to me.

"Q. Did he say anything else to you then?

"A. That's the last I remember after he dropped his hand and I turned back and looked at the house, and when I went to turn back, he hit me in the mouth, and I don't remember nothing else.

"Q. He hit you in the mouth?

"A. Yeah, that's how come my mouth is messed up right there. (Indicating mouth)

"Q. What did he hit you with?

"A. I don't know. It seemed like he must have hit me with that old gun or something, because he just 'Boom!' like that, and that's the last I remember.

"Q. Now, you say you remember hearing somebody call?

"A. That's right.

"Q. And you went out there to the Sheriff's car?

"A. Yeah?

* * *

"Q. Did he ever tell you - - do you remember him telling you that you were under arrest?

"A. I don't remember him saying them words to me.

"Q. Do you remember him telling you that you had to come with him?

"A. I don't remember him saying that.

"Q. All right. After he hit you, what's the next thing you remember?

"A. Actually I just remember - - I just don't remember that - - it seemed like I stepped out the back door of David's house and looked at that tater house - -

"Q. Looked at what?

"A. That tater house back there; a thing that he had made to keep Irish Potatoes in. And I looked at it and I don't remember nothing else from there.

"Q. Is that the only thing you remember?

"A. Yeah. That night, or somewhere, I remember somebody dragging me from somewhere - - off of some porch."

In conclusion, appellant testified that he remembered nothing about shooting Sheriff Sizemore.

Pastoria Cade testified that she was the mother of appellant and that he was thirty-nine years old. Appellant was not normal at the time of birth, having no mouth. Mrs. Cade "Clipped him a mouth" with a safety razor blade. Nor did appellant have a normal childhood, often flying "off the handle." These spells usually occurred once a month.

Mrs. Cade further testified that she had known Sheriff Sizemore since 1960 or earlier. On occasion, Sizemore had made threats against appellant, telling Mrs. Cade and her husband that "He (appellant) is one nigger he was going to kill."

Dr. Fernando Lopez testified that he was a practicing psychiatrist in Dothan, Alabama. Lopez became a physician in Lima, Peru, in 1958, and interned in Iowa. Having received psychiatric training at the University of Minnesota and the University of Missouri from 1960 to 1963, Lopez was "board certified in Psychiatry to practice psychiatry of high quality in the United States."

On March 2, 1978, Lopez examined appellant in his office in Dothan, Alabama. At that time Lopez had a copy of a report on appellant compiled at Searcy Hospital. Following is Lopez's opinion of appellant's mental condition.

> "Q. Doctor, will you tell the jury your findings concerning Clyde Cade's mental condition, based upon your examination and the report of Searcy Hospital?
>
> "A. All right. In reviewing the social history, the medical findings, the neurological findings, the psychological findings, the psychiatrist's opinion in this report, and my psychiatrist interview, I come to the conclusion that this fellow; Mr. Cade, has a sociopathic personality problem, and in law terms, as they mention here, an anti-social personality. That's the way that he's been functioning for life. On top of this problem, his personality, he has had numerous traumatic sequations; meaning physical injury, to his body and to his brain; accidents, being hit in the head, and the most important one is alcohol consumption. This man has been drinking for many years, maybe 28 or 30 years. We know in Psychiatry and medical science that alcohol will destroy brain cells. It will damage the brain to the point that these people; like Mr. Cade shows, will become more impulsive, lose control of their emotions quicker, more irritable; they are more liable to change very quick. They could be laughing for no reason, or smiling, or getting angry, and they don't have control of it. They have memory problems, they become more forgetful, and they use poor judgment. These characteristics that I have mentioned to you; we Psychiatrists call it an 'organic brain syndrome.' In this case, it is organic brain syndrome associated with alcoholism. This is nothing to do with the personality. As I said, people with this brain damage, it could be mild, light mild, severe, and have this kind of mental

functioning that I described to you: the memory, the forgetfulness, poor judgment, and labile affect. You can see all of these, and I have found all of these in Mr. Cade.

"Q. Doctor, based upon your findings, I'll ask you a question that has to assume certain things, and I would like for you to listen to it very carefully if you will.

"A. Yes, sir.

"Q. Assuming that Clyde Cade has, in fact, the personality disorders as testified to; that is, the anti-social personality disorder with superficial passive-aggressive features as contained in the report of Searcy Hospital, together with mild neurological deficits, and assuming further that a white Sheriff has told him that if he ever has to arrest him again that he will kill him, and assuming further that Clyde Cade has consumed enough alcohol on the occasion to be classified as 'intoxicated', and further, assuming that upon direct confrontation of Clyde Cade by this Sheriff, he is struck in the mouth by the Sheriff, and assuming further that Clyde Cade takes a gun from the Sheriff and shoots him six times, in your medical judgement, would Clyde Cade be acting in response to an irresistible impulse?

"A. Yes, sir.

"Q. Based upon those assumptions, would he be, in your opinion, functioning at that time with a diminished mental ability or control?

"A. Yes, sir.

"Q. And based upon your examination and the examination of Searcy Hospital, does he have any control over those actions under those circumstances?

"A. No, sir, he doesn't."

During cross-examination, Lopez testified that he personally interviewed the appellant for thirty-five minutes. Further, appellant could discern right from wrong and adhere to the right if he were sober. Nor did Lopez disagree with the Searcy report findings on appellant's condition.

In rebuttal, David L. Key testified that he was the father of Shirley Johnson and Dianne Butts. Within a month prior to Sheriff Sizemore's death, appellant made a statement to Key concerning the Sheriff.

From the record:

"Q. What did he say?

"A. He said that, 'Mr. Red wasn't going to carry him down no more, that he would kill him', or something or another like that, you know.

"Q. Well, to refresh your recollection, was the statement, 'Before Mr. Red carries me to jail again, he's going to have to kill me or I'm going to kill him?'

"A. That's right.

"Q. Is that what he said?

"A. That's right.

"Q. Had he been drinking?

"A. No, sir, not at the time."

Key's testimony concluded the evidence heard in the case. Following argument by counsel, the court's oral charge, and deliberation, the jury returned the following verdict:

"THE COURT: Ladies and Gentlemen of the Jury, is the verdict of the Jury that I hold in my hand?

"JURORS: (All responding) Yes.

"THE COURT: 'We the Jury, find the Defendant, Clyde Cade, guilty of unlawfully and with malice aforethought killing L. D. Sizemore; a Sheriff, to-wit: the Sheriff of Geneva County, Alabama, because of an official job related act of the officer, to-wit: the arrest of said Clyde Cade, by shooting him with a gun or pistol, and affix the Defendant, Clyde Cade's punishment at death.' Signed, 'Curt Segler', foreperson."

After the jury was polled, each juror proclaiming the verdict as his own, the trial court adjudged appellant guilty and set a date for a sentencing hearing. Appellant was also informed of the automatic appeal of his conviction.

At the sentencing hearing the State presented in evidence a pre-sentence report for an arrest of leaving the scene of an accident in 1976. The chronological history of appellant's arrests from that report is set out below:

"10-11-58 Geneva, Alabama Public Drunkenness $10.00 Fine

"8-28-59 Raiford, Florida Breaking and Entering 18 months

"11-21-61 Geneva, Ala. Grand Larceny (Auto) Nolle Prossed

"11-21-61	Geneva, Ala.	Burglary	13 months
"11-19-62	" "	Grand Larceny	3 years
"11-19-62	" "	Assault to Murder	Nolle Prossed
"7-6-66	" "	Assault to Murder	No Bill
"11-2-68	" "	Disposing of Property Covered by Lien	
"4-3-69	" "	Removing Mortgaged Property	
"8-14-70	" "	Highway Intoxication	
"9-21-70	" "	Public Drunkenness	
"12-30-70	" "	Alias Public Drunkenness	
"5-1-71	" "	Reckless Driving	$25.00 Fine
"5-1-71	" "	No Driver's License	$10.00 Fine
"10-16-72	" "	Fraudulent Check	$100.00 Fine
"1-20-73	" "	Drawing Dangerous Weapon	Not guilty
"7-27-73	" "	Public Drunkenness	
"7-27-73	" "	Assault on Police Officer	
"11-16-73	" "	Fraudulent Check	
"11-16-73	" "	Alias Public Drunkenness	
"8-10-74	" "	Fraudulent Check	$50.00 Fine
"9-30-74	" "	Alias Fraudulent Check	released
"1-25-75	" "	Burglary	Pending in Circuit Court
"3-26-75	Enterprise, Ala.	Destroying Personal Property	Nolle Prossed
"3-26-75	" "	Destroying Personal Property	" "
"7-4-75	Geneva, Ala.	Public Drunkenness	$5.00 Fine
"8-3-75	" "	No Tag	$10.00 Fine
"8-3-75	" "	No Driver's License	$10.00 Fine
"8-16-75	" "	Public Drunkenness	$10.00 Fine
"9-6-75	" "	Driving While Revoked	$25.00 Fine
"9-6-75	" "	Reckless Driving	$25.00 Fine

"9-6-75	Geneva, Ala.	Switching Tag	$10.00 Fine
"9-6-75	" "	Failing to Yield to Emergency	
"9-13-75	" "	Willfull failure to appear	$10.00 Fine
"9-13-75	" "	Willfull failure to appear	$10.00 Fine
"10-3-75	Enterprise, Ala.	Bond Forfeiture	Nolle Prossed
"11-27-75	Geneva, Ala.	Destroying Personal Property	60 days
"1-31-76	" "	Fraudulent Check	Willfull failure to appear
"2-18-76	Enterprise, Ala.	Leaving Scene of Accident	Probation
"4-5-76	Geneva, Ala.	Fraudulent Check Alias	$50.00
"4-18-76	" "	Disturbing the Peace	Pending"

Additionally, the State presented a report prepared by the Board of Pardons and Paroles, dated November 28, 1961, detailing the appellant's burglarization of a store in Geneva County; and the reports concerning prior offenses.

The State also presented a statement taken by Steve Weakley, an investigator for the Department of Public Safety, from Willie Allen Bryant, deceased prior to trial. That statement is set out below:

"Date - 8-9-77

"Time - 9:55 p.m.

"Location - Route 1, Box 117, Chancellor

"Residence - Mae Pearl Horace

"Witness - Willie Allen Bryant (Peter Rabit)

"On August 3, 1977 between 5:30 p.m. and 6:30 p.m. I was standing in Mae Pearl Horace's front yard. I heard several gun shots coming from the direction of David Lee Key's house. I was by myself in the front yard. I went to the edge of the yard and looked toward the Key house with Mae Pearl Horace. I saw L. C. standing behind his car with a rifle or shotgun telling Clyde to 'Come on out and give himself up.' I heard him call Clyde by name. Mae Pearl went back into the house. I stayed at the edge of the yard looking toward the Key

house. When I started to the house Clyde Cade was standing between me and the house. Clyde ask me for some cartridges (bullets). I told him I did not have any. He said he was going to kill Dick Key and his daughters. Clyde then turned and left walking in the road back toward the Key house. That is the last time I saw Clyde Cade. He had blood all over his face when I talked to him. It looked like his lip was busted. This is a true and correct statement.

"Witness: Mae Pearl Horace

"his mark X_____

"Statement taken by: Steve Weekley"

Appellant presented no evidence. However, he argued that his severe emotional and personality problems should mitigate the imposition of the death penalty. Additionally, appellant again noted that the State presented no evidence of a lawful arrest of appellant by Sheriff Sizemore.

After the hearing of the evidence and argument of counsel, the court made the following written findings:

"This being the date set for a hearing in accordance with law to determine whether or not the Court will sentence the defendant to death or to life imprisonment without parole after the following jury verdict was rendered on the 15th day of March, 1978: 'We, the Jury, find the defendant, Clyde Cade, guilty of unlawfully and with malice aforethought killing L. D. Sizemore, a sheriff, to-wit: the Sheriff of Geneva County, Alabama, because of an official or job related act of such officer, to-wit: the arrest of said Clyde Cade, by shooting him with a gun or pistol and fix the defendant, Clyde Cade's punishment at death.'

"And the defendant, Clyde Cade being present in open court at this hearing with his attorney, Honorable Joseph Hughes and the state being represented by the Honorable Edward Boswell, District Attorney, and W. B. Matthews, Assistant District Attorney.

"And evidence and argument having been presented to the Court relevant to the sentencing of Clyde Cade, including matters relating to the aggravating and mitigating circumstances enumerated in Title 13-11-6 and Title 13-11-7 of the Code of Alabama, 1975.

"And the Court having considered all of the evidence presented at the trial of this cause which was started on March 13, 1978 and completed on March 15, 1978.

"The Court finds from the evidence that Clyde Cade was guilty and is guilty of killing L. D. Sizemore, the Sheriff of Geneva County, Alabama because of an official or job related act, the arrest of the defendant, by shooting him with a pistol;

"The Court further finds that the defendant, Clyde Cade, shot L. D. Sizemore, the Sheriff of Geneva County with a pistol; that as a result of the shooting, L. D. Sizemore died; that the killing was willful, deliberate, malicious, and premeditated; that these four elements co-existed before and at the time Clyde Cade killed L. D. Sizemore; that the offense constituted first degree murder of L. D. Sizemore;

"The Court further finds that at the time of the murder, L. D. Sizemore was the Sheriff of Geneva County, Alabama; that he was performing an official or job related act of arresting Clyde Cade as a result of Clyde Cade committing an offense in L. D. Sizemore's presence or as a result of his threatening to breach the peace in his presence;

"The Court further finds that this Capital felony of first degree murder was committed for the (1) purpose of avoiding or preventing a lawful arrest, and

"The Court further finds that this Capital felony was committed to disrupt or hinder the lawful (2) exercise of a government function of the enforcement of the law. The evidence showed that L. D. Sizemore was the Sheriff of Geneva County, Alabama; that Clyde Cade was creating a disturbance in the Key Community; that a complaint had been made to the Geneva County Sheriff's office concerning the disturbance being created by Clyde Cade in the Key Community; that shortly after the complaint was made, L. D. Sizemore arrived at the scene of the disturbance in the Key Community in Geneva County, Alabama; that Clyde Cade was disorderly, threatening and boisterous in the presence of the Sheriff; that Clyde Cade assaulted the Sheriff and shot him five times while he was unarmed and sitting in his patrol car; that at the time, L. D. Sizemore, the Sheriff of Geneva County, Alabama, was functioning as he is required to do under the laws of the State of Alabama: that is, investigating complaints, making an arrest for breaches of the peace, threatened in his presence or offenses committed in his presence and protecting other citizens from the disorderly, threatening and boisterous conduct of the defendant and from the defendant's conduct in so disturbing the peace on the property of the Keys without the owner, occupants, or others who have the authority, consenting to the said conduct on their property; that the Sheriff was enforcing the law by arresting Clyde Cade, who was unlawfully preventing the Keys from being able to peacefully enjoy and use their home through his threatening, disorderly and boisterous conduct on the property of the Keys for which they had immediate right to possession of to the exclusion of Clyde Cade; that L. D. Sizemore was doing at the time that which he was elected to do by the citizens of Geneva County and that is protecting the life and property

of law abiding citizens from unlawful intrusions on their persons and property by anyone conducting himself as Clyde Cade was on this occasion,

"The Court further has considered all of the testimony concerning the diminished responsibility of the defendant, his state of mind at the time of the killing, his degree of intoxication, his mental competency, the circumstances surrounding the killing and whether or not it was done in the heat of passion, and the Court finds that the defendant did not act under extreme duress and that he had the capacity to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of law was not substantially impaired,

"The Court, after considering all the evidence in the case and the circumstances of the offense, together with the character and propensity of the defendant, Clyde Cade, and after weighing the aggravating and mitigating circumstances and the punishment of death by the jury, finds that the defendant, Clyde Cade, should be sentenced to death.

"This the 27 day of March, 1978.

/s/ P. B. McLauchlin, Jr.
P. B. McLauchlin, Jr.
Judge, 33rd Judicial Circuit"

At the time, the trial court sentenced appellant to death, appellant having said that he remembered "none of it," and that "part of it was lies."

Appellant first contends that the Alabama Capital Sentencing procedures are violative of due process in that the statute allows the imposition of the death penalty in an arbitrary or capricious manner and that the imposition of the death penalty is standardless. This question has been put to rest in this State, our Supreme Court affirming the constitutionality of Act 213, 1975 Ala. Acts, page 701 et. seq., now Sections 13-11-2, et. seq., Alabama Code of 1975, in Ex parte: Jerry Wayne Jacobs, S.Ct. 2808, on May 19, 1978. Further, in denying Jacobs' application for rehearing on August 11, 1978, the Alabama Supreme Court held that Alabama's sentencing scheme in capital cases comports with the decisions of the United States Supreme Court in Bell v. Ohio and Lockett v. Ohio.

Next appellant argues that Count I of the indictment alleged nothing other than first degree murder; thus, its inclusion with the capital counts resulted in duplicity, and a misjoinder of offenses. Additionally appellant contends that the Grand Jury attempted to delegate its discretion to the trial judge in deciding whether to charge appellant with a capital or a non-capital offense. Therefore the trial judge's sustaining a demurrer to Count I of the indictment was an arbitrary exercise of discretion prohibited by Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 236.

In responding to appellant's contentions, we first examine the indictment in view of the rules of criminal procedure. The trial judge's sustaining the demurrer as to Count I eliminated it, and if the indictment, before the demurrer was sustained, was subject to attack for misjoinder, this defect was cured by the trial court's action. Barnett v. State, 16 Ala.App. 539, 79 So. 675, cert. denied, 202 Ala. 191, 79 So. 677.

As to the trial judge's sustaining the demurrer amounting to an arbitrary exercise of discretion in deciding whether or not appellant should be prosecuted for a capital crime of a non-capital offense, we do not think that the mandate of Furman, supra, has been contravened. Furman was, in part, the result of the jury's unfettered power to arbitrarily inflict the ultimate sanction on some defendants while merely imprisoning others. Under pre-Furman statutory capital schemes, the death penalty could truly be imposed on a standardless basis.

However, Furman did not proscribe the use of any discretion in cases which could be prosecuted as capital. The control of discretion required by Furman is aimed at the sentencing body. In Gregg v. Georgia, 428 U.S. 153, at 199, 96 S.Ct. 2909, 49 L.Ed.2d 859, we find the following language discussing discretionary stages in the Georgia capital punishment scheme:

"First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a defendant to a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

"The existence of these discretionary stages is not determinative of the issues before us. At each of these stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. Furman, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant." (Emphasis added)

We agree with the trial court that Count I of the indictment attempted to aver the requisite aggravation as found in Section 13-11-2(5), Code of Alabama 1975, in an insufficient manner. A description of the victim is not required in an indictment for homicide.

Next appellant argues that under the indictment a "legal" arrest of appellant by the victim was necessary to sustain his conviction and that the evidence presented did not establish that appellant's arrest was legal.

Section 15-10-3, Code of Alabama, 1975, provides,

"An officer may arrest any person without a warrant, on any day and at any time, for:

"(1) Any public offense committed or a breach of the peace threatened in his presence;

"(2) When a felony has been committed, though not in his presence, by the person arrested;

"(3) When a felony has been committed and he has reasonable cause to believe that the person arrested committed it;

"(4) When he has reasonable cause to believe that the person arrested has committed a felony, although it may afterwards appear that a felony had not in fact been committed; or

"(5) On a charge made, upon reasonable cause, that the person arrested has committed a felony."

Appellant contends that no offense was ever committed in the presence of Sheriff Sizemore by him. Thus, the State's failure to prove that Sheriff Sizemore had a warrant for appellant's arrest was fatal to the prosecution. While Sheriff Sizemore did not see the behavior of appellant complained of by Dianne Butts and Shirley Johnson, the evidence is clear that after his arrival in the Key community, Sheriff Sizemore observed appellant behaving in an unruly and boisterous manner, using profanity. The Sheriff also had a conversation with Dianne Butts before taking any action. This behavior indicated appellant's purpose to breach the peace and, under the evidence, it was proper to submit to the jury the question of whether Sheriff Sizemore was justified in arresting appellant without a warrant. Price v. McConnell, 250 Ala. 686, 36 So.2d 80, and cases cited therein.

In Price v. McConnell, supra, the Supreme Court held:

"It is the law in this state that a policeman or town marshal may, without warrant, arrest anyone who commits a breach of the peace in his presence, or who, by boisterous conduct, accompanied by violent words or actions, indicates a purpose to commit a breach of the peace...."

The office of sheriff is one of ancient origin. Its creation goes back at least to the time of King Alfred of England. The holder of the office has always been the chief executive officer and conservator of the peace in his county. 80 C.J.S., Section 1, and cases there cited. The sheriff certainly has the authority, without warrant, to arrest anyone who commits a breach of the peace in his presence, "or who, by boisterous conduct, accompanied by violent words or actions, indicates a purpose to commit a breach of the peace."

Under the facts in this case, we hold the Sheriff had the power and authority, without warrant, to arrest appellant.

Finally, it is necessary to review the sufficiency of the evidence to sustain appellant's conviction. There is absolutely no doubt that appellant murdered Sheriff Sizemore, the State's evidence tending to show through direct evidence that Sizemore was killed when he attempted to arrest appellant for a threatened breach of the peace in his presence.

The question remains only whether or not appellant was responsibile for his acts.

Section 15-16-2, Code of Alabama, 1975, provides:

> "Every person over 14 years of age charged with crime is presumed to be responsible for his acts, and the burden of proving that he is irresponsible is cast upon the accused. The defense of insanity in all criminal prosecutions shall be clearly proved to the reasonable satisfaction of the jury."

The defense of insanity is an affirmative one, the burden of which never shifts to the prosecution. Grammer v. State, 239 Ala. 633, 196 So. 268. A verdict of guilty concludes the issue of insanity at the time of the commission of the offense unless a preponderance of the evidence indicates palpable error. Orforda v. State, Ala.Cr.App., 339 So.2d 1038, cert. denied, Ala., 339 So.2d 1042.

A careful examination of appellant's evidence on this issue, the testimony of Dr. Lopez and the appellant's mother falls short of clearly establishing that at the time of the commission of the crime appellant was afflicted with a diseased mind to the extent that (1) he did not know right from wrong as applied to the particular act in question, or (2) if he did have such knowledge, he, nevertheless, by reason of duress of such mental disease, had so far lost the power to select the right and to avoid doing the act in question as that his free agency was at the time destroyed, and (3) that, at the same time, the crime was so connected with such mental disease, in relation of cause and effect, as to have been the product of it solely. Parsons v. State, 81 Ala. 477, 2 So. 854; Hafley v. State, Ala.Cr.App., 342 So.2d 308, cert. denied, Ala., 342 So.2d 412.

We have carefully reviewed the written findings of the trial court at the sentencing hearing as provided by Section 13-11-4, Code of Alabama 1975. The trial court fully complied with the cited section, and its findings and sentence are fully supported by the evidence. We do not find sufficient mitigating circumstances to outweigh the aggravating circumstances to justify an interference with the final judgment and sentence imposed by the trial court. Whatever the range of demonic thoughts that passed through the sadistic mind of the defendant, it appears clear that he intentionally shot and killed Sheriff Sizemore with the pistol that he seized from the Sheriff during the attempted arrest and while the Sheriff was in his car trying to leave the scene. This was a cold, calculated, and deliberate killing of a defenseless officer who was engaged in the performance of his duties as a conservator of the peace.

We have carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none. Death is the penalty of the law, and the penalty is just. The judgment is in all things affirmed.

AFFIRMED.

All the Judges concur.

MAY 25 1979

THE STATE OF ALABAMA - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1978-79

Ex parte: Clyde Cade

PETITION FOR WRIT OF CERTIORARI
TO COURT OF CRIMINAL APPEALS

(Re: Clyde Cade

78-288 v.

State of Alabama)

PER CURIAM.

We have carefully reviewed the opinion of the Court of Criminal Appeals and the record of the proceedings in this cause, and are convinced that the judgment of the Court of Criminal Appeals is due to be, and is affirmed.

AFFIRMED.

Torbert, C. J., Bloodworth, Maddox, Faulkner, Almon, Shores, Embry and Beatty, JJ., concur.

Jones, J., dissents.

P-1

JONES, JUSTICE (Dissenting):

I concur in the affirmance of the judgment of conviction. I respectfully dissent and would reverse and remand the judgment of sentence. My views on the constitutionality of our Death Penalty Statute are expressed in my dissenting opinion in Jacobs v. State, 361 So.2d 640 (Ala. 1978).

My chief concern lies in the mandate of the Statute that, upon finding the defendant guilty, the jury "shall fix the punishment at death." This mandatory requirement, it seems to me, imposes an undue, almost overwhelming, pressure upon the trial judge as he exercises the awesome responsibility of weighing the aggravating and mitigating circumstances in deciding the ultimate life/death fate of the accused. The bifurcated sentencing hearing, as mandated by Gregg[1], can accomplish its intended purpose only if the final sentencing authority is totally free to evaluate, one against the other, all the aggravating and mitigating circumstances surrounding the offense and the offender; and this freedom should be unencumbered by any prior determination, in an unbifurcated context, of the ultimate sentencing issue.

I am not here concerned with the question of who, under the statutory scheme of our Death Penalty Act, is the sentencing authority--the jury or the judge. My concern transcends this academic aspect of the problem and centers on the more basic question: Within the cultural and political realities of the real life world, can the trial judge make a truly independent judgment on the life/death issue in the bifurcated sentencing hearing in face of a jury verdict of " . . . guilty . . . and we fix his punishment at death in the electric chair"? Otherwise stated, can the sentencing

1. Gregg v. Georgia, 428 U.S. 153 (1976).

judge genuinely accept the sentencing portion of the jury verdict as surplusage and, uninfluenced thereby, render judgment of sentence on the evidence adduced at the trial proper and the subsequent bifurcated sentencing hearing. I do not mean by this, of course, that he should not consider the aggravated nature of the offense as complying with the statutory definition of a capital crime for which the death penalty is permissible. Rather, my concern is that the Statute inherently imposes the undue influence of the death penalty portion of the jury verdict upon the trial judge's ultimate judgment of sentence. It was my point, at the time of writing the Jacobs dissent, that it is impractical and unreasonable to expect even the most honest and courageous trial judge to execute the duties of his office in a vacuum.

It must be said, however, after a rather stormy beginning,[2] experience thus far has proved my fears at least partially wrong. Of the 65 death penalty convictions to date, 22 defendants have been sentenced to life without parole. This does not end the debate, of course. It may be pointed out that 13 of these 22 were sentenced to life without parole on a negotiated plea of guilty with no jury verdict of death. (The propriety of this procedure is currently pending before this Court.) The remaining 9 have drawn considerable publicity, and it is no secret that any judge, despite the merits of the individual case, risks public condemnation, as well as his political future, each time he "tampers" with a jury verdict of death.[3]

All of this is to say that I had understood (or, perhaps, I had presumed) that the majority in Jacobs was saying that our Death

2. See footnote 3 in my dissenting opinion in Jacobs v. State, 361 So.2d at p. 350.

3. I have placed the word "tampers" in quotation marks to signify that it is not my choice of word, but it is the word used or inferred by the critics of judges who reduce the death sentence fixed by the jury to life without parole.

Penalty Statute, imposing upon the trial judge--as the ultimate sentencing authority--the discretion to reduce the sentence if reduction is warranted by the evidence, comports with the constitutional guidelines of Gregg; and this in spite of a jury verdict that fixes the defendant's punishment at death. I thought the holding of Jacobs necessarily implied that the jury's sentence of death would not inherently encumber the trial judge's exercise of his discretion in the sentencing process.

Here, again, let me emphasize that I am not saying (and on this point there is no disagreement between the majority and the dissent in Jacobs) that the trial judge does not, or should not, consider the verdict of guilty (otherwise the bifurcated sentencing hearing would not be taking place) or the total circumstances (both aggravating and mitigating) adduced in both proceedings surrounding the deceased and the crime. What I am saying is this: I thought our point of difference in Jacobs centered on what I termed as the inherent constitutional deficiency of the Statute that structured a system whereby the defendant comes before the trial judge for sentencing, having already been sentenced to die by a jury who had no discretion to do otherwise upon its finding of guilty.[4] The majority, finding no such deficiency, had to be saying that the trial judge, notwithstanding this death verdict by the jury, can objectively weigh all the aggravating and mitigating circumstances and exercise his judicial discretion in fixing the sentence either at death or at life without parole.

With this premise established, I turn now to what I perceive as error in the instant case. The trial Court's sentencing order reads in pertinent part:

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4. It is interesting to note that the jury's sentencing role under the Florida Death Penalty Statute, though a recommendation merely comes after a full, bifurcated sentencing hearing. See Proffitt v. Florida, 428 U.S. 242 (1976) and Dobbert v. Florida, ___ U.S. ___ (1977) [Case No. 76-5306]. By contrast, our Statute mandates the death penalty by the jury upon its finding of guilty absent any sentencing hearing whatsoever.

". . . evidence and argument having been presented to the Court relevant to the sentencing of Clyde Cade, including matters relating to the aggravating and mitigating circumstances enumerated in Title 13-11-6 and Title 13-11-7 of the Code of Alabama, 1975,

"And the Court having considered all of the evidence presented at the trial of this cause which was started on March 13, 1978 and completed on March 15, 1978,

"The Court finds from the evidence that Clyde Cade was guilty and is guilty of killing L. D. Sizemore, the Sheriff of Geneva County, Alabama because of an official or job related act, the arrest of the defendant, by shooting him with a pistol;

"The Court further finds that the defendant, Clyde Cade, shot L. D. Sizemore, the Sheriff of Geneva County with a pistol; that as a result of the shooting, L. D. Sizemore died; that the killing was willful, deliberate, malicious, and premeditated; that these four elements co-existed before and at the time Clyde Cade killed L. D. Sizemore; that the offense constituted first degree murder of L. D. Sizemore;

"The Court further finds that at the time of the murder, L. D. Sizemore was the Sheriff of Geneva County, Alabama; that he was performing an official or job related act of arresting Clyde Cade as a result of Clyde Cade committing an offense in L. D. Sizemore's presence or as a result of his threatening to breach the peace in his presence;

"The Court further finds that this Capital felony of first degree murder was committed for the purpose of avoiding or preventing a lawful arrest, and

"The Court further finds that this Capital felony was committed to disrupt or hinder the lawful exercise of a government function or the enforcement of the law. The evidence showed that L. D. Sizemore was the Sheriff of Geneva County, Alabama; that Clyde Cade was creating a disturbance in the Key Community; that a complaint had been made to the Geneva County Sheriff's office concerning the disturbance being created by Clyde Cade in the Key Community; that shortly after the complaint was made, L. D. Sizemore arrived at the scene of the disturbance in the Key Community in Geneva County, Alabama; that Clyde Cade was disorderly, threatening and boisterous in the presence of the Sheriff; that Clyde Cade assaulted the Sheriff and

shot him five times while he was unarmed and sitting in his patrol car; that at the time, L. D. Sizemore, the Sheriff of Geneva County, Alabama, was functioning as he is required to do under the laws of the State of Alabama: that is, investigating complaints, making an arrest for breaches of the peace, threatened in his presence or offenses committed in his presence and protecting other citizens from the disorderly, threatening and boisterous conduct of the defendant and from the defendant's conduct in so disturbing the peace on the property of the Keys without the owner, occupants, or others who have the authority, consenting to the said conduct on their property; that the Sheriff was enforcing the law by arresting Clyde Cade, who was unlawfully preventing the Keys from being able to peacefully enjoy and use their home through his threatening, disorderly and boisterous conduct on the property of the Keys or property for which they had immediate right to possession of to the exclusion of Clyde Cade; that L. D. Sizemore was doing at the time that which he was elected to do by the citizens of Geneva County and that is protecting the life and property of law abiding citizens from unlawful intrusions on their person and property by anyone conducting themselves as Clyde Cade was on this occasion.

"The Court further has considered all of the testimony concerning the diminished responsibility of the defendant, his state of mind at the time of the killing, his degree of intoxication, his mental competency, the circumstances surrounding the killing and whether or not it was done in the heat of passion, and the Court finds that the defendant did not act under extreme duress and that he had the capacity to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of law was not substantially impaired.

"The Court, after considering all the evidence in the case and the circumstances of the offense, together with the character and propensity of the defendant, Clyde Cade, and after weighing the aggravating and mitigating circumstances and the punishment of death by the jury, finds the defendant, Clyde Cade, should be sentenced to death." (Emphasis added.)

Here, the trial Judge forthrightly and candidly admits that one of the aggravating circumstances considered by him in his judgment of the death sentence was, " . . . and the punishment of death by the jury . . . ." The apprehension voiced in my dissent in Jacobs, which I felt was an inherent and necessary incident in every case, is set out here in clear, unmistakable language. This sentencing order is susceptible of only one meaning: The Judge is saying that among those circumstances considered by him in exercising his discretion in favor of the sentence of death is the fact that a jury of twelve persons, in returning a guilty verdict, has already fixed the Defendant's punishment at death. True, we do not know how much weight he gave the jury's death sentence; but, surely, we cannot speculate that, had he given it no consideration, he would have reached the same conclusion. Indeed, it is just as reasonable to assume that his consideration of the jury's death sentence tipped the scales in favor of his judgment fixing the punishment at death.

The majority of this Court in Jacobs said in effect that it would not assume, absent evidence to the contrary (as I admit I wrongfully did), that the trial judges of this State would not honestly and courageously discharge the duties of their office in objectively weighing the aggravating and mitigating circumstances of each individual case uninfluenced by the mandatory jury sentence of death.

The reason the jury's verdict as to the sentence cannot constitute any part of the trial judge's consideration should be obvious. The jury's function is to determine the defendant's guilt or innocence of the capital murder charged in the indictment.

For the verdict to go beyond this and fix the sentence at death as mandated by the Statute without the exercise of guided discretion brings the case squarely within the prohibition of Woodson.[5]

If the jury cannot act, under these circumstances, as the ultimate sentencing authority (which it clearly cannot), then, surely, its sentence of death cannot serve as a consideration in guiding the trial court's search for, and application of, a nondiscriminatory test for determining who shall die and who shall live. Under our statutory scheme, the jury's sentence of death means only that the jury has returned a verdict of guilty. It would be ludicrous to suppose that under our Statute the jury will find guilty only those it feels should be put to death and discharge as not guilty all others charged under our Statute. To make such an assumption is, of itself, an acknowledgment of our Statute's unconstitutionality under the test of Gregg and Woodson.

The trial proper, in its unbifurcated context, has furnished the jury neither adequate data of aggravation and mitigation nor legal guidelines for the exercise of its guided discretion--the very deficiency contained in Woodson. Moreover, the jury's discretion under our Statute is not to convict the defendant of the offense and then decide in a bifurcated sentencing hearing if he lives or dies; rather, its only choice (other than to disagree and mistry the case) is to discharge the defendant as not guilty or to convict him and sentence him to death. Therefore, to allow the trial judge to consider the jury's verdict of death as an aggravating circumstance in arriving at his ultimate judgment of the death penalty is to commit the same error--or, more accurately, to commit the same error compounded.

5. Woodson v. North Carolina, 428 U.S. 280 (1976).

I, J. O. Sentell, Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appears of record in said Court.

Witness my hand this 25 day of May 19 77

J. O. Sentell

Clerk, Supreme Court of Alabama

APPENDIX C

ALABAMA COURT OF CRIMINAL APPEALS

CAPITAL OPINIONS

Case Name	Docket Number	Action Taken
Jerry Wayne Jacobs vs. State	6 Div. 389	Conviction and Sentence Affirmed
John L. Jacobs v. State	6 Div. 388	Conviction and Sentence Affirmed
John Louis Evans and Wayne Eugene Ritter	1 Div. 837	Conviction and Sentence Affirmed
Recardo Cook v. State	6 Div. 489	Conviction and Sentence Affirmed
Thomas Wilson v. State	1 Div. 866	Conviction and Sentence Affirmed
Gilbert Beck v. State	7 Div. 560	Conviction and Sentence Affirmed
Billy Ray Williamson v. State	8 Div. 3	Conviction and Sentence Affirmed
Roy Clements v. State	7 Div. 575	Conviction and Sentence Affirmed
Timothy Watters v. State	6 Div. 730	Conviction and Sentence Affirmed
Willie Mack v. State	3 Div. 869	Conviction and Sentence Affirmed
Bryan Baldwin v. State	1 Div. 901	Conviction and Sentence Affirmed
Herbert Richardson v. State	4 Div. 624	Conviction and Sentence Affirmed
Edward Horsley v. State	1 Div. 931	Conviction and Sentence Affirmed
Walter Hill v. State	6 Div. 670	Reversed
Clyde Cade v. State	4 Div. 640	Conviction and Sentence Affirmed
Charles Bracewell v. State	4 Div. 646	Conviction and Sentence Affirmed
Thomas Whisenhant v. State	6 Div. 634	Reversed
Woodrow Keller v. State	4 Div. 629	Conviction Affirmed Remand for Sentence Hearing
Roger Thomas v. State	2 Div. 238	Conviction and Sentence Affirmed

J. B. Hubbard v. State	6 Div. 715	Conviction Affirmed Remand for Sentence Hearing
Debra Bracewell v. State	4 Div. 663	Reversed
Edward Ashlock v. State	6 Div. 784	Reversed

APPENDIX D

ALABAMA COURT OF CRIMINAL APPEALS

LIFE WITHOUT PAROLE OPINIONS

Case Name	Docket Number	Action Taken
Howard Lee Prothro v. State	5 Div. 419	Reversed
Eddie Bernard Neal	6 Div. 894	Affirmed

APPENDIX E

ALABAMA SUPREME COURT

CAPITAL OPINIONS

Case Name	Docket Number	Action Taken
Jerry Wayne Jacobs v. State	S.C. 2809	Conviction and Sentence Affirmed
John Evans v. State	77-180	Conviction and Sentence Affirmed
*Recardo Cook v. State	77-320	Conviction Affirmed Remanded for Sentence Hearing
Gilbert Beck v. State	77-530	Conviction and Sentence Affirmed
Billy Williamson v. State	77-610	Conviction and Sentence Affirmed
Thomas Wilson v. State	77-433	Conviction and Sentence Affirmed
Timothy Watters v. State	77-676	Reversed
Roy Clements v. State	77-643	Reversed
John L. Jacobs v. State	77-724	Reversed

* Cook was originally affirmed by the Court of Criminal Appeals. The Supreme Court upheld the conviction but remanded for new findings on the issue of sentence. The Court of Criminal Appeals then reversed on the authority of the Supreme Court opinion in Clements.

Supreme Court, U.S.
FILED
NOV 19 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 79-5525

CLYDE CADE,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

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BRIEF IN OPPOSITION TO
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BRIEF AND ARGUMENT OF RESPONDENT

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals affirming the Petitioner's conviction and sentence has not yet been reported. The opinion of the Supreme Court of Alabama affirming the conviction and sentence also have not been reported.

QUESTIONS PRESENTED

I.

WHETHER ALABAMA'S STATUTORY PRECLUSION FROM CONSIDERATION OF LESSER INCLUDED OFFENSES BY A JURY IN A CAPITAL CASE IS CONSTITUTIONAL?

II.

WHETHER ALABAMA'S DEATH PENALTY STATUTE IS RENDERED UNCONSTITUTIONAL BY THE SIMPLE FACT THAT IT REQUIRES THE JURY TO STATE IN ITS VERDICT THAT IT "FIXES THE PUNISHMENT AT DEATH"?

III.

WHETHER THE STRUCTURE OF ALABAMA'S DEATH STATUTE INSURES THAT AT LEAST ONE AGGRAVATING CIRCUMSTANCE WILL BE PROVED BEYOND A REASONABLE DOUBT BEFORE A DEFENDANT CAN BE SENTENCED TO DEATH?

IV.

WHETHER THE STATUTORY REQUIREMENT THAT THE JUDGE SENTENCE THE DEFENDANT PURSUANT TO A VERDICT OF GUILT BY THE JURY AND THAT HE CONSIDER THE JURY VERDICT IN WEIGHING THE EVIDENCE RENDERS THE STATUTE UNCONSTITUTIONAL?

V.

WHETHER ALABAMA'S DEATH STATUTE ALLOWS THE SENTENCING AUTHORITY TO CONSIDER AS A MITIGATING FACTOR ANY ASPECT OF A DEFENDANT'S CHARACTER AND RECORD, ANY OF THE CIRCUMSTANCES OF THE OFFENSE, AND ANY OTHER RELEVANT EVIDENCE IN MITIGATION TOWARD A SENTENCE LESS THAN DEATH?

VI.

WHETHER THE ALABAMA APPELLATE COURTS EXERCISE COMPARATIVE APPELLATE REVIEW OF SENTENCES IN CAPITAL CASES AND INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AT THE APPELLATE LEVEL?

VII.

WHETHER ALABAMA'S DEATH PENALTY ACT CONSTITUTES A MANDATORY SENTENCING PROCEDURE?

VIII.

WHETHER THE TRIAL JUDGE CONSIDERED THE JURY DEATH SENTENCE AS AN AGGRAVATING CIRCUMSTANCE IN FIXING THE PUNISHMENT AT GUILT?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. This case involves the Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the Alabama Death Penalty Act, which is codified as Code of Alabama 1975, §13-11-1, et seq., and which is set out in full on pages 3-7 of Petitioner's brief.

JURISDICTION

The Petitioner invokes jurisdiction pursuant to 28 U.S.C. §1247(3).

STATEMENT OF THE CASE

The Petitioner, Clyde Cade, was indicted by the Grand Jury of Geneva County, Alabama on August 31, 1977, for the murder of L. D. Sizemore, Sheriff of Geneva County, Alabama. Petitioner was tried under Code of Alabama 1975, §13-11-1, et seq., which makes the murder of a sheriff or peace officer of any kind a capital offense if such peace officer is on duty or performing a job-related act.

After a three-day trial, ending March 15, 1978, the jury found the Petitioner guilty and fixed his punishment at death. On March 27, 1978, the trial judge held a post-conviction sentencing as required by §13-11-3, Code of Alabama 1975, to determine whether Petitioner would be sentenced to death or to life imprisonment without parole. At the sentencing hearing the State offered evidence of Petitioner's prior record through pre-sentence reports, a report prepared by the Alabama Board of Pardons and Parole, and a statement taken by a state investigator (R. 523-530).

The Petitioner presented no mitigating evidence, although his attorney did state to the court that Petitioner had severe emotional and personality problems which should mitigate the imposition of the death penalty (R. 530-531). After conducting the sentence hearing, the trial court concluded that the Petitioner's sentence should be death, and entered written findings supporting that sentence (R. 78).

Petitioner was given an automatic review of his conviction and sentence in an appeal to the Alabama Court of Criminal Appeals. On November 21, 1978, the Alabama Court of Criminal Appeals affirmed Petitioner's conviction and sentence. Petitioner's petition for rehearing was denied on January 30, 1979.

Petitioner filed a petition for writ of certiorari with the Alabama Supreme Court, and this petition was granted as a matter of right, as required by Rule 39(c) of the Alabama Rules of Appellate Procedure, on March 6, 1979. On May 25, 1979, the Alabama Supreme Court affirmed Petitioner's conviction and sentence.

STATEMENT OF THE FACTS

The facts surrounding the killing of Sheriff L. D. Sizemore are set out in detail in the opinion of the Court of Criminal Appeals of Alabama, which is attached as Appendix A to Petitioner's brief. The following is a summary of those facts.

On the afternoon of August 3, 1977, Clyde Cade went to the home of Diane Butts, in a small community near Geneva, Alabama, and asked to see her sister Shirley. When told that Shirley was not home, appellant replied, "I'm going to kill her" and opened a pocket knife. Mrs. Butts pushed him out the door. Cade then began pulling on a window screen

outside. Mrs. Butts threw a drink bottle at him shattering the window. When Shirley returned hom a short time later, Cade took a piece of board out to her car and said he was going to knock out the windshield. Shirley left and went to a neighbor's house, Mr. L. C. Thomas, and told him about the disturbance. Thomas then called the Geneva County sheriff's office.

A short time later, Sheriff Sizemore arrived at the Butts' home and called for Clyde to come out of the house. Cade came out, saying, "I ain't going nowhere. I ain't going to jail." Then Sheriff Sizemore said, "Turn around and let me search you." And Cade again said, "I ain't going to jail." According to the combined testimony of three eyewitnesses, Cade then grabbed Sheriff Sizemore around the waist and they fell. Cade came up with the Sheriff's gun and told the Sheriff to leave. Sizemore threw up his hands and said, "Okay. I give up." He then got in the car, there were several shots, and Sheriff Sizemore was found dead in his car. Cade turned around and ran through some woods behind the Butts' home. Officers later found him in his house lying down in the bedroom, with a revolver underneath his head. Ballistics tests reflected that two bullets recovered from Sheriff Sizemore's head and neck were fired from this revolver.

Cade claimed that he did not remember any of the circumstances surrounding the shooting and contended that he had mental problems resulting from head injuries. The State called a psychiatrist who had evaluated Cade to testify that in his opinion Cade was sane at the time he committed the act and was able to appreciate the difference between right and wrong.

SUMMARY OF THE ARGUMENT

The Alabama death penalty statute does not allow the jury to return a verdict for a lesser included offense and thus avoids the kind of jury discrimination deemed unconstitutional in Furman v. Georgia, 408 U.S. 238, 411. The fact that juries are not allowed to consider lesser included offenses does not make it likely that jurors will sentence to death a person who has not been proved guilty of every element of a capital offense. In order to do so, jurors would have to violate their oaths, to ignore the instructions of the trial judge, and to act in a manner contrary to the historical behavior of juries. There is no evidence that this has happened or will happen. In any event, the Petitioner has not shown that there was any evidence upon which to base a charge for a lesser included offense.

The provision in Alabama's statute which requires the jury to "fix the punishment at death," is there to impress upon jurors the seriousness and gravity of what they are doing when they render a verdict of guilty. Such a provision does not render the statute "mandatory" and unconstitutional but, to the contrary, strengthens the statute by further insuring that a jury will not arbitrarily or discriminatorily convict a defendant.

There is no court decision that requires a certain standard of proof at a sentencing hearing after a jury has been convinced beyond a reasonable doubt that a defendant is guilty. Even so, the structure of Alabama's death statute insures that at least one aggravating circumstance will be proved beyond a reasonable doubt before a defendant can be sentenced to death.

Alabama's provision for judicial rather than jury sentencing in capital cases is constitutional and is a

superior method of sentencing. Prior sentencing decisions reflect that Alabama trial judges do act responsibly in sentencing capital offenders, and that they are not unduly influenced by public pressure or by the jury verdict of guilt.

The trial judge is in no way precluded from considering as a mitigating factor at the sentencing hearing any aspect of a defendant's character or record, any of the circumstances of the offense, or any other relevant evidence in mitigation of the death sentence that a defendant desires to submit. The trial judge can give these factors mitigating weight independent from the statutorily enumerated mitigating factors.

The Alabama Appellate Courts review capital cases for the dual purposes of insuring a fair and impartial trial and insuring consistency and uniformity in sentencing. Recent appellate court decisions reflect this comparative review of death sentences.

Alabama's death penalty act is not mandatory because the sentencing authority has the option of sentencing a convicted capital felon to life imprisonment without parole. A review of cases tried under Alabama's capital murder statute reflects that a sentence of life imprisonment has been imposed in a number of instances.

The trial judge considered the verdict of guilt by the jury as a part of the total surrounding circumstances of this case. There is no evidence to support an assumption that he considered the jury verdict as an aggravating circumstance. The language of his written findings reflects that the jury verdict was considered separately from the aggravating and mitigating circumstances.

ARGUMENT

I.

THE STATUTORY PRECLUSION FROM CONSIDERATION OF LESSER INCLUDED OFFENSES BY A JURY IN A CAPITAL CASE IS CONSTITUTIONAL.

Under Alabama's death penalty statute, Code of Alabama 1975, §§13-11-1 through 13-11-9, there are no lesser included offenses. Section 13-11-2(a) expressly precludes them.

This Honorable Court has granted certiorari in the case of Gilbert Franklin Beck v. Alabama, No. 78-6621, to review the constitutionality of the preclusion of lesser included offenses. The Court granted certiorari on the specific limited question that follows:

> "May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included offense, and when the evidence would have supported such a verdict?"

The constitutional challenge is limited here to cases where there is evidence upon which to base a conviction of a lesser included offense. Conversely, where there is not sufficient evidence to support a conviction for a lesser included offense, such a charge would not be properly given.

In the instant case, Petitioner has neither alleged nor demonstrated to the Court that there is any evidence upon which to base a conviction for a lesser included offense. Yet Petitioner does not dispute that lesser included offenses must be factually established in order to be charged. Indeed, the evidence is clear that Clyde Cade shot Sheriff Sizemore while the Sheriff was attempting to arrest him. The evidence is also clear that the Sheriff was on duty and performing a job-related act. While there was some evidence presented by

Petitioner on the issue of his sanity, the jury had the option of finding Cade not guilty by reason of insanity.

The law is settled that a defendant is entitled to a charge on a lesser crime only if there is some evidence which would justify a conviction of the lesser offense, and only if proof on the elements differentiating the two crimes is sufficient. See, e.g., U. S. v. Nelson, 563 F. 2d 928 (C.A. Minn. 1977); U. S. v. Whitaker, 447 F. 2d 314, 144 U.S. App. D.C. 344 (1971).

Petitioner maintains that the Alabama Legislature drafted the death statute in an attempt to meet the requirements of Furman v. Georgia, 408 U.S. 238 (1972), but that the Legislature misinterpreted Furman. It is true that Alabama's death statute was drafted in light of Furman and to avoid the pitfalls of jury discrimination prohibited by Furman. The most effective way to insure that the jury was not allowed the unfettered discretion to apply the death penalty in a discriminatory manner was to preclude their consideration of lesser included offenses. The preclusion of lesser included offenses from consideration by the jury avoids the pitfalls denounced in Furman, and thereby promotes sentencing that is consistent with the Constitution.

Alabama's statute provides for judicial sentencing rather than jury sentencing. The advantages of judicial sentencing are discussed at pages 25-26 of this brief. No capital punishment system which permits a jury to return a conviction on a lesser included offense in a capital case will ever attain the full advantages of judicial sentencing. As long as the jury has the kind of discretion which the availability of lesser included offenses allows them, the inconsistency denounced in Furman will be present and the greater consistency of judicial sentencing and appellate review of sentencing

will always be undermined. See, Roberts v. Louisiana, 428 U.S. 325, 335 (1976) (plurality opinion). As stated in Woodson v. North Carolina, 428 U.S. 280, 302 (1976), any capital sentencing scheme in which jurors are tempted by the availability of lesser included offenses merely papers over the problem of de facto jury discretion.

In his brief Petitioner speculates that the preclusion of lesser included offenses might encourage juries to convict a defendant of a lesser offense which should have been, but was not, included. Such speculation is unpersuasive for several reasons. First, there is absolutely no evidence that such irresponsibility by jurors has ever occurred or will ever occur. In this case, the trial judge repeatedly and extensively instructed the jury that the jury as a whole and each individual juror would have to be convinced beyond a reasonable doubt and to a moral certainty of the existence of all the elements of a capital offense before the jury could convict the defendant (R. 497, 498, 516). The jurors were properly instructed on this point, and "it should not be assumed that juries will disobey or nullify their instructions." Jurek v. Texas, 428 U.S. 262, 279 (1976) (concurring opinion of Justice White, joined by Chief Justice Burger and Justice Rehnquist).

Experience directly contradicts Petitioner's assertion that the jury tends to resolve its doubts in favor of conviction. The available evidence indicates that because of compassion, juries tend, if anything, to resolve such questions in favor of the accused. The jury nullification data relied upon to strike down mandatory death penalty sentences in Woodson v. North Carolina, 428 U.S. 280, 289-293 (plurality opinion), demonstrates the extent to which juries will go to spare defendants from capital punishment. In the fact of such evidence, Petitioner's argument that

jurors would callously elect to send to his death a man whom they concluded was not guilty of a capital offense is totally unsupported.

Finally, if the jury finds that a defendant is guilty of some offense other than the capital offense charged, the jury is not faced with what Petitioner calls the "Hobson's choice" of acquitting a criminal or of returning a verdict sentencing a man to death for a capital offense of which he is not guilty. Instead, the Alabama statutes specifically provide that the jury can refuse to agree on a verdict or on the sentence of death and thereby cause a mistrial. Code of Alabama 1975, §13-11-2(c).

Petitioner argues in a footnote on p. 17 of his brief that, even in a mistrial each juror must make a choice, and that the option of mistrial is meaningless because no capital jury in Alabama has been instructed that a mistrial is one of its options.

Apparently, Petitioner overlooked the trial judge's instruction to the jury in this case (R. 513) that there were four possible outcomes, one of which was a mistrial. The judge first instructed the jury regarding the three other possible outcomes—"guilty," "not guilty by reason of insanity," or "not guilty." The trial judge then stated:

> "If you fail to agree on a verdict of guilty or not guilty, or if you fail to agree on the affixing of the penalty of death, then the court would declare a mistrial. So, those are the four possible outcomes after you have begun your deliberation." (R. 513)

A similar charge was given by the trial judge in Jacobs v. State, 361 So. 2d 607, (Ala. 1978). The Court there further instructed the jury that Jacobs could be reindicted for a lesser included offense.

The option of mistrial does not require that a juror make a "Hobson's choice." It simply requires that he make no choice at all—that he fail to reach a decision. This

is a very real, very important, option for the juror and safeguard for, the defendant. If a single juror does not agree with the majority, he is not required to vote to convict or acquit. He can simply fail to agree with the majority and cause a mistrial. There have been at least three mistrials to date under the Alabama statute.

In summary, the inclusion of lesser included offenses in a capital sentencing system is not constitutionally required. Preclusion of lesser included offenses serves important constitutional goals, and there is no evidence whatsoever that it will result in the conviction of a defendant who is not guilty of a capital offense. In any event, the Alabama statutory system contains an important safety-valve in that a mistrial can be declared if a jury is unable to agree on a verdict or on the sentence of death. After such a mistrial, the defendant can be re-tried for the capital offense or he can be reindicted for a non-capital offense.

II.

A PROVISION WHICH REQUIRES THE JURY TO IMPOSE A "SENTENCE" OF DEATH DOES NOT RENDER THE STATUTE UNCONSTITUTIONAL AND DOES NOT MAKE THE STATUTE "MANDATORY."

Petitioner asserts that a capital sentencing scheme which requires a jury, upon conviction, to "fix the punishment at death," is unconstitutional in that it encourages arbitrary and wanton jury discretion. He maintains that juries faced with "sentencing" a person to death will be pressured into acquitting guilty defendants whom they feel do not deserve to die, and in convicting defendants who are not guilty of capital offenses, but who are guilty of a lesser included offense.

There is absolutely no evidence to substantiate this charge. To the contrary, the provision that the jury "fix the punishment at death," is for the purpose of insuring that the jury consider the seriousness of their verdict and impose or withhold the death penalty appropriately.

While the statute is phrased such that the jury must "fix the punishment at death," this is only an adjudication of guilt and not a sentence. The jury's function is to determine guilt or innocence, but the judge is the actual sentencing authority. Jacobs v. State, 361 So. 2d 607, 631 (Ala. 1978).

However, even though the jury is not the sentencing authority, the requirement that any guilty verdict it returns "fix the punishment at death" serves a very important function. Because of the profound difference between death and other punishments, greater reliability is necessary in capital cases. See, Lockett v. Ohio, 98 S. Ct. 2954, 2964 (1978) (plurality opinion). The fact-finding process should not be taken lightly. In a capital case, a procedural device is valuable if it helps insure that jurors vote to convict only those defendants of whose guilt the jurors are truly convinced beyond any reasonable doubt and to a moral certainty. The best way to insure that jurors are aware of their awesome task and its terrible responsibilities is to confront them with it. That is what the statutory provision accomplishes when it requires the jury to phrase a guilty verdict in terms of the punishment of death, even though the jury is not the sentencing authority. Any capital sentencing system in which the jury is tempted to shift its responsibility to the judge runs the risk that guilt adjudication will not be as reliable as possible. Under Alabama's system, the jury has more reason to realize its serious responsibility and to discharge it with care.

This Court's decisions in Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976), are not authority for invalidating Alabama's new Death Penalty Act.

Petitioner's argument is that the Woodson and Roberts cases are authority for the proposition that under Alabama's statute juries might exercise a "de facto sentencing discretion" which would lead to unconstitutional arbitrariness and capriciousness in the infliction of the death penalty. However, the Alabama statute is constitutionally different from the North Carolina and Louisiana statutes which were struck down in Woodson and Roberts. Those statutes were seen as permitting or even encouraging jurors to use de facto sentencing discretion through the device of convicting for lesser included offenses. Indeed, the Louisiana statute required that juries be instructed on lesser included offenses even when the evidence would not support such an instruction. Alabama's statute contains no lesser included offenses. Code of Alabama 1975, §13-11-2(a). Jury nullification through lesser included offenses is not possible under the Alabama statute. Instead, the only possibility for jury nullification is through acquittal or mistrial. The offenses which are punishable by death under the Alabama statute are very narrowly drawn to include only the most serious and dangerous crimes. There is simply no real prospect that a jury, convinced beyond a reasonable doubt that a person had committed a serious and dangerous crime, would ignore their instructions and let that person go free. Similarly, there is no evidence to indicate that a jury would convict a person unless they were completely satisfied that he was guilty of a capital offense.

The historical evidence relied upon in Woodson and Roberts to predict that those two statutes would operate

capriciously does not correspondingly support such a prediction with respect to the operation of Alabama's statute. First of all, the offenses made punishable by death under Alabama's statute are very narrowly drawn to include only the most dangerous and serious crimes. The conviction rate is as high as it is because only the most serious and most well-prepared cases are brought under the death statute. More time and effort is expended because of seriousness of the offense and the nature of the crime. If overwhelming evidence was not gathered in support of aggravated murder, the prosecution would use the regular homicide statute, where lesser included offenses would be available.

Secondly, Alabama's statute does not permit the exercise of de facto jury sentencing discretion by allowing convictions for lesser included offenses. The historical evidence about jury nullification was influenced by the fact that it included the results of mandatory death acts which were broadly drafted to include a broad range of crimes. Such historical evidence is also inapplicable to the present case because it was based upon cases brought under statutes which permitted de facto jury discretion through convictions for lesser included offenses.

In summary, Alabama's statute has been carefully drafted to insure the reliability of any guilty verdicts obtained under the act. There is no opportunity for the kind of de facto sentencing discretion which has been held constitutionally impermissible. The way the statute is drafted and the operation of the statute to date indicates that the death penalty will not be inflicted in an arbitrary and capricious manner under the statute.

III.

THE STRUCTURE OF ALABAMA'S DEATH STATUTE INSURES THAT AT LEAST ONE AGGRAVATING CIRCUMSTANCE WILL BE PROVEN BEYOND A REASONABLE DOUBT BEFORE A DEFENDANT CAN BE SENTENCED TO DEATH.

Petitioner argues that because Alabama's death statute does not explicitly require the State to prove the existence of aggravating circumstances beyond a reasonable doubt at the sentencing hearing, and that the statute thereby violates the accused's due process right to require the State to prove his guilt beyond a reasonable doubt.

The statute does require that the State prove to the jury, who determines guilt or innocence, that the defendant is guilty beyond a reasonable doubt. The sentencing hearing is held pursuant to a determination of guilt, and at that point the defendant had had his due process requirement, that he be proven guilty beyond a reasonable doubt, fulfilled.

Under Alabama's death penalty statute, the State has the burden of proving at least one aggravating circumstance. Under Code of Alabama 1975, §13-11-4(1), unless at least one aggravating circumstance is proven the death penalty cannot be imposed. Jacobs v. State, 361 So. 2d 607, 631 (Ala. Cr. App. 1977) ("If the trial judge, in his written findings, determines that one or more aggravating circumstances attended the offense charged, then, and only then, can he impose the death sentence.") The State can, and often will, prove more than one aggravating circumstance, but it must prove at least one or there will be a sentence of life without parole.

Because of the way in which the definitions of the substantive capital offenses overlap with the list of aggravating circumstances, the State must in all, or virtually all, cases prove the existence of at least one aggravating circumstance beyond a reasonable doubt and to a moral certainty. The definitions of capital crimes are set out

in Section 13-11-2(a). The list of aggravating circumstances is contained in Section 13-11-6. They overlap almost completely. For example, in proving a defendant guilty beyond a reasonable doubt and to a moral certainty of any of the four capital crimes defined in Section 13-11-2(a)(1)-(4), the State will have established beyond a reasonable doubt and to a moral certainty the existence of the aggravating circumstance listed in Section 13-11-6(4).

The same is true of the remaining capital offenses defined in the statute. If the State does not prove them beyond a reasonable doubt, then there will be an acquittal. If the State does prove any of them sufficiently to get a conviction, then that same proof will almost certainly establish at least one and often more than one of the aggravating circumstances beyond a reasonable doubt. For example, in the instant case, in order to prove Clyde Cade guilty beyond a reasonable doubt of the capital crime set out in §13-11-2(a)(5), the State necessarily had to prove the defendant guilty beyond a reasonable doubt of the aggravated circumstance set out in §13-11-6(7).

In fact, the State in this case had to go even further than normally required in its case and prove beyond a reasonable doubt that the job-related activity in which the Sheriff was engaged was an arrest, because the indictment specified an arrest. This element of proof is identical to aggravating circumstance number 5, that "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest... ." It is possible to strain the imagination and conjure up a theoretically possible case in which there is not a factual overlap between the capital offense proven and at least one of the aggravating circumstances, but this Court's inquiry should be based on reality instead of conjecture and speculation.

The reality is that in proving a defined capital offense beyond a reasonable doubt the State will prove beyond a reasonable doubt an aggravating circumstance. That is all the Constitution requires.

Support for this manner of approaching and resolving the issue is found in Spinkellink v. Wainwright, 578 F. 2d 582, 610 (5th Cir. 1978). In that case, Petitioner argued that Florida's statute was unconstitutional because it did not require proof beyond a reasonable doubt of aggravating circumstances. While not holding that such a standard of proof was constitutionally required, the Fifth Circuit Court of Appeals held that it was provided by the overlap of the Florida statute's definitions of capital offense with its list of aggravating circumstances. The Fifth Circuit opinion in Spinkellink v. Wainwright, 578 F. 2d at 610, quotes and relies upon the following passage from the Florida Supreme Court's decision in State v. Dixon, 283 So. 2d 1, 9:

> "The aggravating circumstances of Fla. stat. § 921.14(6) [sic], F.S.A., actually define those crimes—when read in conjunction with Fla. Stat. §§ 782.04(1) and 794.01(1), F.S.A.— to which the death penalty is applicable in the absence of mitigating circumstances. As such, they must be proved beyond a reasonable doubt before being considered by judge or jury.

The same is true of Alabama's statute, and the result should be the same also.[1] This Honorable Court need not determine

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[1]The analogy between Alabama's statute and Florida's statute on this point is particularly apt, because the eight aggravating circumstances in Florida's statute are identical except for a minor difference to the eight aggravating circumstances in Alabama's statute. Compare section 13-11-6 of Alabama's statute with the relevant part of Florida's statute which is quoted in Proffitt v. Florida, 428 U.S. at 248, n. 6. The only difference is that Alabama's fourth aggravating circumstance omits arson, aircraft piracy, and bombing.

whether it is constitutionally necessary that at least one aggravating circumstance be proven beyond a reasonable doubt before a defendant can be sentenced to death. Such a determination is unnecessary, because the structure of Alabama's statute insures that such will be the case.

In any event, the trial court judge who sentenced Petitioner found two aggravating circumstances to exist. The Court found (1) that the capital felony of first degree murder was committed for the purpose of avoiding or preventing a lawful arrest, and (2) that the capital felony was committed to disrupt or hinder the lawful exercise of a government function of the enforcement of the law (R. 76-77). The State was required to prove both of these circumstances beyond a reasonable doubt before the jury.

Under Alabama's statute, after the State has established one or more aggravating circumstances, the defendant and his attorney have a full and fair opportunity to rebut the evidence presented concerning aggravating circumstances and to present any evidence or make any arguments concerning mitigating circumstances. Section 13-11-3; Beck v. State, 365 So. 2d 985, 1002 (Ala. Cr. App. 1978).

Once the sentence hearing has been held the trial court judge, as the sentencing authority, must weigh the aggravating circumstances found against the mitigating circumstances. This weighing process is not a task which lends itself to formalistic rules. As the Alabama Supreme Court noted in Ex Parte: Recardo Cook, ___ So. 2d ___ (Ala. Sept. 15, 1978) (plurality opinion), Ms. Op. at 14:

> "Once all of the proper evidence has been received at the sentencing hearing and arguments have been given, the trial judge must 'weigh the aggravating and mitigating circumstances' and sentence the defendant to death or life imprisonment without parole. §13-11-4, Code of Ala. 1975. This 'balancing' should not, however, be construed to authorize a 'tallying' of items for and against the defendant. We can readily envision

> situations where several aggravating circumstances may not be sufficient to outweigh only one mitigating circumstance and, on the other hand, where numerous mitigating circumstances may be present but opposed to one aggravating circumstance so outrageous as to justify the death penalty. In conducting these hearings trial judges should keep in mind their ability to order presentence investigations and psychiatric evaluations to obtain a full picture of the defendant."

No court has ever held that the sentencing authority must apply a particular standard of persuasion to the sentence decision itself. The Fifth Circuit did not so hold in Spinkellink v. Wainwright, supra. The United States Supreme Court has never so held. The statutes it upheld in Gregg v. Georgia, supra, and Proffitt v. Florida, supra, did not so provide.

If it is ever held that the sentencing decision itself must be made in light of some particular standard of persuasion applied in the sentencing authority's mind, then Alabama's death penalty statute can be so interpreted. See, e.g., Universal Amusement Co. v. Vance, 587 F. 2d 159, 166 (5th Cir. 1978) (en banc); Pugh v. Rainwater, 572 F. 2d 1053 (5th Cir. 1978) (en banc). For now, it should suffice that under any conceivable standard Petitioner was deserving of the death penalty, and no reasonable unbiased person could conceivably have decided the matter differently than the trial court judge in Petitioner's case.

In summary, because of the manner in which Alabama's death penalty statute is drafted, in order to reach the sentencing phase in a case the State will necessarily have had to prove beyond a reasonable doubt at least one aggravating circumstance. Whether ever that much is constitutionally required need not be decided in this case. If it is ever held to be constitutionally necessary to apply any particular standard of persuasion to the sentencing decision itself, then Alabama's statute can be so interpreted.

For purposes of the present case, the sentencing determination involving Petitioner was clearly correct under any standard.

IV.

THE STATUTORY REQUIREMENTS THAT THE JUDGE SENTENCE THE DEFENDANT PURSUANT TO A VERDICT OF GUILT BY THE JURY AND THAT HE CONSIDER THE JURY VERDICT IN WEIGHING THE EVIDENCE DO NOT RENDER THE STATUTE UNCONSTITUTIONAL.

Petitioner argues, in essence, that Alabama's statute should be declared unconstitutional because judges will not perform their sentencing function responsibly.

Alabama's Death Penalty Act requires the trial judge to hold a sentence hearing and carefully weigh the aggravating and mitigating circumstances in each case before deciding whether to sentence the defendant to death or to life imprisonment without parole. Code of Alabama 1975, §13-11-4.

Petitioner contends that because this hearing is held after a verdict of guilt has been rendered by the jury, the trial judge will be unduly influenced by public pressure to uphold the verdict of guilt.

There is no evidence to substantiate Petitioner's speculation that public pressure will cause trial court judges to act improperly. Trial judges are frequently put under great pressure, particularly where controversial cases are involved. But the fact that the judge is under pressure does not invalidate the particular statutes involved in the case. In light of recent public outcry against the death penalty, the State could equally argue that the trial judge is put under a tremendous pressure to reduce a verdict of death to life imprisonment. On page 28 of Petitioner's brief, he gives an example of the

"outcry of unjustified criticism" which he feels will occur whenever a judge fails to sentence to death a defendant convicted under Alabama's capital punishment statute. The example which Petitioner gives does not demonstrate that public pressure will cause judges to act improperly in carrying out their sentencing duties under the capital punishment statute. Instead, that example establishes just the contrary. As Petitioner indicates, the example which he cites was originally given in the dissenting opinion of Justice Jones, below. Jacobs v. State of Alabama, 361 So. 2d 640, 650-651, n. 3 (Ala. 1978) (dissenting opinion). In answering that argument of Justice Jones, the majority opinion of the Alabama Supreme Court, 361 So. 2d at 654, stated:

> "In his original dissent, Mr. Justice Jones stated: 'The majority's judicial review "cure all" obtains even less credence when it is understood that such guided discretion is placed upon a popularly-elected official.' He supports his conclusion dehors the record by citing an example in footnote 3 of his dissent, and states that public comment or clamor will influence trial judges to ignore mitigating circumstances. We hesitate to go outside the record to answer Mr. Justice Jones' conclusion, but we feel constrained to do so, since he infers that elected judges will not do their sworn duty, and will be unduly swayed by public pressure. Since Mr. Justice Jones made his observation, we have been informed that the same trial judge who conducted the trial in the case mentioned by Justice Jones has again sentenced a defendant to life without parole. State v. Eddie Bernard Neal, #78-00639, decided August 7, 1978, 10th Judicial Circuit. We are also informed that a jury in Covington County acquitted a defendant charged under the capital felony statute. State v. David Bronner, #CC 7825, decided April 19, 1978, 22nd Judicial Circuit. Consequently, any suggestion that either judges or jurors will fail to do their sworn duty because of public comment or clamor should not be entertained.

The fact that a trial court judge, who was subjected to what Petitioner and Justice Jones perceived to be such an outcry

of public criticism, later sentenced another defendant to life without parole indicates that trial court judges will not be unduly influenced by public opinion.

The sentencing decisions which trial court judges have made under Alabama's new capital punishment act further evidences that public pressure will not prevent judges from pronouncing non-capital sentences when they feel that the mitigating and aggravating circumstances in a particular case do not justify the death penalty. Under Alabama's new Death Penalty Act, 43 sentence hearings have been held after a defendant pleaded not guilty and was convicted by a jury. In at least 9 of these cases, the trial judge has sentenced the defendant to life imprisonment without parole instead of to death.[2]

There is a sound, logical reason for having the judge, rather than the jury, sentence the defendant, which is stated by the Alabama Court of Criminal Appeals in Beck v. State, 365 So. 2d at 1001, as follows:

> "Under the Alabama death penalty statute, the question of sentence is not considered until the determination of guilt has been made. At that time the trial judge becomes the sentencing authority and uses his experience as a trial judge in applying the mandates of the capital murder statute in assessing and determining the aggravating and mitigating circumstances of the offense. An experienced trial judge is in a better position to face the difficult task of imposing a death sentence because he daily faces the problem of assessing information concerning a defendant who is charged with a crime. He is accustomed to using sentencing information provided by the probation officers in our pardon and parole system."

The Act also directs the judge to consider the jury verdict when weighing the aggravating and mitigating circumstances

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[2]See Appendix A to this brief, a copy of stipulation between the attorneys for both parties in the habeas corpus appeal of Evans v. Britton, 472 F. Supp. 707 (D.C. Ala. 1979).

at the sentence hearing. The reason for this direction is obvious. In virtually every case, a jury verdict finding a defendant guilty of one of the aggravated offenses listed in §13-11-2(a) will evidence that the jury has found beyond a reasonable doubt the existence of one or more of the statutory aggravating circumstances which §13-11-6 directs the judge to consider in determining the sentence.[3]

The jury's verdict in this case, as in virtually every case, is certainly relevant to the weighing of aggravating and mitigating circumstances, because it establishes that at least one aggravating circumstance exists. The jury verdict in no way forecloses the question of how much weight should be given to the aggravating circumstance that the jury's verdict evidences. The same statutory section that directs the judge to consider the jury's verdict requires that he also consider any matters relating to other aggravating or mitigating circumstances in any and all evidence of probative value for his sentencing decision.

While the jury's verdict of guilty is a necessary step in the sentencing process and will almost always reflect the existence of at least one aggravating circumstance, the judge is the sentencing authority, not the jury. Jacobs v. State of Alabama, 361 So. 2d 640, 644 (Ala. 1978). The consideration of all aggravating and mitigating circumstances is the responsibility of the judge, and no sentence exists until the judge independently weighs the competing considerations and pronounces sentence. Jacobs v. State of Alabama, 361 So. 2d 607, 631 (Ala. Cr. App. 1977); Beck v. State of Alabama, (Ala. Cr. App. April 4, 1978) Ms. Opinion p. 38.

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[3]For examples, see page 19 of this brief.

Petitioner's argument that the Alabama statute should be declared unconstitutional because judges cannot be expected to perform their sentencing function responsibly is closely analogous to the argument that capital punishment statutes are inherently arbitrary and capricious because prosecutors cannot be expected to exercise their prosecutorial and plea-bargaining powers properly. This Court has rejected that argument many times. Gregg v. Georgia, 428 U.S. 153, 199 (1976) (joint opinion by Justice Stewart, Justice Powell, and Justice Stevens); Id. at 224-225 (concurring opinion of Justice White, joined by Chief Justice Burger, and Justice Rehnquist); Proffitt v. Florida, 428 U.S. 242, 254 (joint opinion of Justice Stewart, Justice Powell, and Justice Stevens); Id. at 261 (concurring opinion of Justice White, joined by Chief Justice Burger, and Justice Rehnquist); Jurek v. Texas, 428 U.S. 262, 274 (joint opinion of Justice Stewart, Justice Powell, and Justice Stevens); Id. at 278-279 (concurring opinion of Justice White, joined by Chief Justice Burger, and Justice Rehnquist). Just as this Court has rejected the argument that prosecutors will perform their duties improperly, so also should it reject the suggestion that this Court assume that trial court judges will discharge their sentencing duties in an improper and irresponsible manner.

V.

ALABAMA'S DEATH PENALTY STATUTE ALLOWS THE SENTENCING AUTHORITY TO CONSIDER AS A MITIGATING FACTOR ANY ASPECT OF A DEFENDANT'S CHARACTER AND RECORD, ANY OF THE CIRCUMSTANCES OF THE OFFENSE, AND ANY OTHER RELEVANT EVIDENCE IN MITIGATION THAT THE DEFENDANT PROFFERS AS A SENTENCE LESS THAN DEATH.

Under Alabama's Death Penalty Act, if the jury finds the defendant guilty, the trial judge is required to hold a

separate sentence hearing for the purpose of determining the appropriate punishment for that specific defendant. Code of Alabama 1975, §13-11-3. The statute states that the purpose of this sentence hearing is, "...to aid the court to determine whether or not the court will sentence the defendant to death or to life without parole."

Petitioner's contention is that the sentencing authority can only consider those mitigating circumstances which are set out in Code of Alabama 1975, §13-11-7 in determining whether a sentence of death should be imposed on a particular defendant. Petitioner argues that since §13-11-4 requires that the sentencing authority must weigh the mitigating circumstances which are enumerated in §13-11-7, and since that section says that certain considerations "shall be" the mitigating circumstances, then the sentencing authority is limited in considering the mitigating factors. However, Petitioner's argument does not give due credit to the provisions of §13-11-3, which state:

> "In the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and shall include any matters relating to any of the aggravating or mitigating circumstances enumerated in Sections 13-11-6 and 13-11-7." [Emphasis added]

The statute further provides that any evidence which the Court deems to have probative value may be received. As this statutory language itself makes clear, the sentencing authority in Alabama is in no way precluded from considering as a mitigating factor any aspect of a defendant's character or record, any of the circumstances of the offense, and any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death.

As evidence of this broad range of considerations which are open to the sentencing authority, the trial judge in the instant case stated in his findings that he

had considered the circumstances of the case, together with the character and propensity of the defendant, as well as the aggravating and mitigating circumstances in finding that the death sentence should be imposed.

Petitioner contends that the provision which allows the judge to consider factors other than the enumerated mitigating circumstances has no real meaning because the trial judge cannot give these factors "independent mitigating weight." This argument ignores the construction and interpretation which has been given these statutory provisions by the Alabama Supreme Court.

After the Alabama Supreme Court had upheld the constitutionality of the Alabama Death Penalty Act in Jacobs v. State, 361 So. 2d 607 (Ala. 1978) this Honorable Court handed down its decision in Lockett v. Ohio, 98 S. Ct. 2954 (1978). Jacobs thereafter asked the Alabama Supreme Court to reconsider its decision in light of the Lockett case. In denying Petitioner's application for rehearing, the Alabama Supreme Court had an opportunity to interpret and construe the sentencing provisions of the Alabama Death Penalty Act in light of this Court's holding in Lockett. The Alabama Supreme Court extended its original opinion, in Jacobs, 361 So. 2d 640, 652-654, and in doing so stated as follows:

> "We deny petitioner's application to rehear this case but we point out that we have examined the cases of Bell v. Ohio, ___ U.S. ___, 98 S. Ct. 2977, 57 L. Ed. 2d 1010 and Lockett v. Ohio, ___ U.S. ___, 98 S. Ct. 2954, 57 L. Ed. 2d 973, decided after petitioner's application for a rehearing was filed, and we conclude that those cases do not invalidate Alabama's sentencing scheme in death cases. Alabama's sentencing scheme specifically provides, in part:
>
> > "...in the hearing, evidence may be presented as to any matter that the court deems relevant to sentence and it shall include any

> matters relating to any of the aggravating or mitigating circumstances enumerated in sections 13-11-6 and 13-11-7. ..." (Emphasis added) (§13-11-3, Code, 1975).

The Alabama Supreme Court added the emphasis to that part of the statute. In view of that provision of the statute, the Alabama Supreme Court, on rehearing, concluded:

> "It is readily apparent, therefore, that Alabama's sentencing scheme broadly allows the accused to present evidence of mitigating circumstances, and does not contain the deficiencies the court found were inherent in Ohio's scheme." (Emphasis in original).

Therefore, the Alabama Supreme Court has construed Alabama's sentencing scheme in death cases to allow the sentencing authority to consider any relevant evidence in mitigation, and this complies with the holding in Lockett.

The Alabama statute is significantly different from the Ohio statute that was struck down in Lockett, supra. The plurality opinion in Lockett, in commenting on the Ohio statute, noted that:

> "The absence of direct proof that a defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it shed some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted as such, to affect the sentencing decision." 98 S. Ct. at 2967.

The very mitigating factors specified in the above quotation from the plurality opinion in Lockett, are expressly set out as separate and independent mitigating factors in the Alabama statute. For example, the absence of direct proof that the defendant intended to cause the death of the victim is expressly covered in Code of Alabama 1975, §13-11-7(4). The consideration of a defendant's comparatively minor role in the offense is also expressly covered in §13-11-7(4). The defendant's age is expressly covered in §13-11-7(7).

In addition to the fact that the Alabama Act has much broader statutory mitigating factors, the Alabama Supreme Court has construed the Act to allow the sentencing authority to consider any relevant evidence in mitigation, regardless of whether or not that evidence is expressly covered in the statutory list. Jacobs v. State of Alabama, 361 So. 2d 640 (Ala. 1978); Ex Parte: Recardo Cook, (Ala. September 15, 1978); Gilbert Franklin Beck v. State of Alabama, (Ala. Cr. App. April 4, 1978).

Not only is the Alabama statute constitutionally different from the Ohio statute struck down in Lockett, but it is constitutionally similar to the statutes upheld in Jurek v. Texas, 428 U.S. 262, 96 S. Ct. 2950, 49 L. Ed. 2d 929 (1976), and Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976). When the Ohio sentencing scheme was struck down in Lockett, supra, the plurality opinion was careful to distinguish the statutes upheld in Gregg v. Georgia, 428 U.S. 153 (1976), and its companion cases from the Ohio statute. As the opinion stated:

> "...none of the statutes we sustained in Gregg and the companion cases clearly operated at that time to prevent the sentencer from considering any aspects of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Lockett v. Ohio, 98 S. Ct. at 2966.

The companion cases of Gregg included, of course, Jurek v. Texas, 428 U.S. 262 (1967) and Proffitt v. Florida, 428 U.S. 242 (1976). The Alabama sentencing provisions are at least as constitutionally broad as the Texas and Florida provisions which were upheld in Jurek, supra, and Proffitt, supra.

The Proffitt case, supra, demonstrates the constitutionality of Alabama's sentencing provision. The Florida statutory provision, which was upheld in Proffitt, supra, Fla. Stat. Ann. §921.141(6) entitled MITIGATING CIRCUMSTANCES,

provides that "Mitigating circumstances shall be the following: ..." and then goes on to list seven statutory mitigating factors. The Alabama provision, Code of Alabama 1975, §13-11-7, entitled MITIGATING CIRCUMSTANCES, provides that, "Mitigating circumstances shall be the following: ..." and then goes on to list seven statutory mitigating factors. Not only is the introductory language in these two corresponding provisions identical, but the actual mitigating circumstances themselves in the Florida and Alabama statutes are identical.

In distinguishing the Florida statute which was upheld in Proffitt from the Ohio statute which was struck down in Lockett, the Lockett plurality observed:

> "...Although the Florida statute approved in Proffitt contained a list of mitigating factors, six members of this court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive. ..." Lockett v. Ohio, 98 S. Ct. at 2966.

The assumption the six members of the Court made in Proffitt and which the Lockett plurality found controlling, is an actual fact in this case. This Court need not assume that the Alabama statute will be interpreted so that the range of mitigating factors listed in the statute is not exclusive. No assumption is necessary, because the Alabama Supreme Court has already ruled that the statutory factors are not exclusive. The Alabama Supreme Court has already ruled in Jacobs v. State of Alabama, supra, that the Alabama statute allows the sentencing authority to consider as a mitigating factor any aspect of a defendant's character and record, any of the circumstances of the offense, and any other relevant evidence in mitigation that the defendant proffers as a basis for a sentence less than death. For this reason, and on the authority of Jurek, supra, Proffitt, supra, and Lockett, supra, the sentencing provisions contained in the Alabama Death Penalty statute are constitutional.

VI.

THE ALABAMA APPELLATE COURTS EXERCISE COMPARATIVE APPELLATE REVIEW OF SENTENCES IN CAPITAL CASES AND INDEPENDENTLY WEIGH THE AGGRAVATING AND MITIGATING CIRCUMSTANCES AT THE APPELLATE LEVEL TO INSURE PROPER SENTENCING.

All capital cases in which the death penalty is imposed at the trial court level are automatically appealed to and reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. This is true even if a defendant does not want his conviction and sentence reviewed on appeal. His case is appealed automatically and fully reviewed at both appellate levels anyway. Evans v. State, 361 So. 2d 666, 667 (Ala. 1978). Capital cases in which the defendant was convicted and received a sentence of life without parole are appealed to and reviewed by the appellate courts only if the defendant elects to do so. Some do. E.g., Eddie Barnard Neal v. State, ___So. 2d ___ (Ala. Cr. App. May 1, 1979); Roosevelt Youngblood v. State, ___ So. 2d ___ (Ala. Cr. App. March 6, 1979); Leslie Evans v. State, 362 So. 2d 1284 (Ala. Cr. App. 1978).

Whether appellate review of sentencing decisions in capital cases is constitutionally necessary is uncertain. From a portion of the opinion in Gardner v. Florida, 430 U.S. at 361, it would appear to be. However, the United States Supreme Court opinion in Jurek v. Texas, 428 U.S. 262 (1976), which upheld the constitutionality of the Texas capital punishment statute is conspicuously silent on the question of appellate review of sentencing decisions. In any event, Alabama has a careful system of appellate review of death sentences which insures that the death penalty will not be inflicted arbitrarily or capriciously under its statute.

In Alabama, appellate review of sentencing in capital cases involves three functions or inquiries: (1) review of

the sentencing process in the trial court to insure that the sentence hearing was conducted properly, that complete written findings were entered, and that statutory provisions concerning aggravating and mitigating circumstances were properly interpreted and applied; (2) independent weighing of the aggravating and mitigating circumstances at the appellate level; and (3) comparative appellate review of the sentence result with the result in other capital cases. All three of these types of appellate review serve to insure, either directly or indirectly, that capital sentencing in Alabama is not arbitrary or capricious.

Alabama appellate courts meticulously search the record in capital cases to insure that the sentencing process was conducted properly. In remanding for a new sentence hearing in Ex Parte: Recardo Cook, ___ So. 2d ___ (Ala. Sept. 15, 1978) (plurality opinion), Ms. Op. at 9, the Alabama Supreme Court noted, "...it is the duty of this court to insure that no error has tainted the trial or the sentencing process." Alabama's appellate courts have diligently discharged that duty.

Consistency in the application of the death penalty is served by the uniform interpretation and application of statutory provisions concerning aggravating and mitigating circumstances. Alabama's appellate courts have sought to insure such consistency by reversing sentences of death and remanding cases for new sentence hearings and determinations where trial courts have misapplied or misinterpreted aggravating and mitigating circumstances. Examples of cases involving sentences of death which were remanded for new sentence hearings and determinations for that reason include Ex Parte: Recardo Cook, supra; Woodrow Wilson Keller, Jr. v. State, ___ So. 2d ___ (Ala. Cr. App. Feb. 20, 1979); See also, Ashlock v. State, 367 So. 2d 560, 561 (Ala.

Cr. App. 1979). In Woodrow Wilson Keller, Jr. v. State, supra, Ms. Op. at 17, the Alabama Court of Criminal Appeals strongly admonished trial courts against any inclination to gradually broaden the scope of aggravating circumstances beyond the strict wording of the statute.

Alabama's appellate courts have also insisted that trial court judges fully comply with the requirement of Code of Alabama 1975, §13-11-4 that complete written findings of fact from the trial and sentence hearing be entered before a capital sentence is pronounced. Cases which have been remanded for a new sentence hearing because complete written findings were not entered in the original sentence determination include J. B. Hubbard v. State, ___ So. 2d ___ (Ala. Cr. App. May 1, 1979); Willie Lewis Mack v. State, ___ So. 2d ___ (Ala. Cr. App. July 25, 1978); Herbert Lee Richardson v. State, ___ So. 2d ___ (Ala. Cr. App. Oct. 3, 1978); see also, Ashlock v. State, supra.

Requiring that a proper sentence hearing be held and that complete written findings be entered serves the goal of consistency in application of the death penalty. It does so, because it makes appellate review of the substantive sentencing decision itself possible. The Alabama Court of Criminal Appeals explicitly recognized this in remanding for a new sentence hearing in Willie Lee Mack v. State, supra, Ms. Op. at 46, where it stated:

> "The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances

> must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done, 'the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision."
>
> "Prior to the date set for the hearing the trial court shall order a presentence report and furnish the defendant and his attorney with a copy of same. The defendant must be afforded the opportunity to adduce any testimony which has any probative value that will enable the court to perform its constitutional responsibility for the question of whether a man should live or die is not to be treated as a mere formality." (Emphasis added)

See also, Herbert Lee Richardson v. State, supra, Ms. Op. at 32-33.

The purpose of the requirement that complete written findings be made in any sentence determination is to facilitate appellate review of the appropriateness of any sentence of death. Jacobs v. State, 361 So. 2d 640, 646-647 (Ala. 1978) (separate opinion by Chief Justice Torbert). Mandatory appellate review, provided by Code of Alabama 1975, §13-11-5 and Alabama Rule of Appellate Procedure 39(c), are also important. As Chief Justice Torbert has noted, "This mandatory review guarantees that, before a defendant can be executed in Alabama, the sentence of death must be found to be appropriate by both the Court of Criminal Appeals and this court after a review of the aggravating and mitigating circumstances found in the case by the trial judge." Jacobs v. State, supra, (emphasis added). In petitioner's own case, the Alabama Supreme Court recognized a "dominant and overriding interest in ensuring that the death penalty is imposed only for utmost of compelling legal reasons," an interest enforceable at the appellate level. Evans v. State, 361 So. 2d at 667.

Appellate review of the substantive sentencing decision itself in death cases does exist in Alabama and it is done

in two ways—independent appellate weighing of the aggravating and mitigating circumstances to determine the appropriateness of the sentence and comparative review at the appellate level of the sentence with others which have been reviewed in similar cases. As the Alabama Court of Criminal Appeals explained in Beck v. State, 365 So. 2d 985, 1000 (Ala. Cr. App. 1978):

> "Under the new Alabama death penalty statute, the defendant has a second chance for life with the trial judge, a third with Court of Criminal Appeals, and a fourth with the Supreme Court of Alabama. Not only are decisions of the trial judge in death cases reviewed to insure a fair and impartial trial, but they will insure consistency and uniformity of sentencing."

An example of a recent case in which the independent weighing of aggravating and mitigating circumstances at the appellate level was expressly revealed in the opinion is Roger Scott Thomas v. State, ___ So. 2d ___ (Ala. Cr. App. March 27, 1979) Ms. Op. at 19, where the Court of Criminal Appeals noted:

> "The trial judge in his order noted the aggravating circumstances, which were here averred and proved at trial, and also determined by the trial judge in the postsentence hearing, as required by law. Additionally, this Court has carefully weighed the aggravating and mitigating circumstances independently.
>
> "We are of the opinion that the punishment here imposed fits the crime for which the appellant has been found duly guilty." (emphasis in original) (footnotes omitted)

Another example is Beck v. State, 365 So. 2d at 1005 where the appellate court stated:

> "We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty."

The appropriateness of the sentence in view of all the facts and circumstances was also noted in Herbert Lee Richardson v. State, supra, Ms. Op. at 39-40.

In the very recent opinion of Eddie Barnard Neal, supra, Judge Bowen of the Court of Criminal Appeals explained, Ms. Op. at 29 (concurring opinion):

> "The import of Jacobs v. State, 361 So. 2d 607 (Ala. Cr. App. 1977), affirmed, 361 So. 2d 640 (Ala. 1978), and Clements v. State, Ala. Cr. App., 7 Div. 575 (Ms. May 16, 1978), reversed on other grounds, Ala. 77-643 (Ms. April 17, 1979), is that this court must independently weigh the aggravating and mitigating circumstances to determine whether they are sufficient to support a sentence of death."

No member of the Alabama Court of Criminal Appeals and no member of the Alabama Supreme Court has ever expressed any doubt about this or made any suggestion to the contrary.

Alabama appellate courts also exercise comparative appellate review of sentences in capital cases. Jacobs v. State, 361 So. 2d 640 (Ala. 1978), was the first case under Alabama's new death penalty statute which reached the appellate level. Since there were no other cases under the new act with which to compare the sentence on appeal, Alabama's appellate courts compared it to sentences in pre-Furman cases under Alabama's old capital punishment statute. The United States Supreme Court has recognized that such a practice is necessary and appropriate at the inception of a new capital punishment statute. Gregg v. Georgia, 428 U.S. 153, 204, n. 56 (1976) (joint opinion of Stewart, Powell, and Stevens, J.J.). In performing its comparative appellate review function, the Alabama Supreme Court stated:

> "The Court of Criminal Appeals has spelled out specifically how death sentences, reviewed under Alabama's

> automatic appeal statute, have been reversed and the cause is remanded for new trials. This Court has carefully reviewed each point raised by the accused in his petition, which was granted as a matter of right because of the sentence of death. We are familiar with other cases reviewed by this Court in the last decade involving death sentences and we are convinced that the sentence here was not arbitrarily or capriciously entered. ..." Jacobs v. State, 361 So. 2d at 644.

In Roy Frank Clements v. State, 370 So. 2d 708 (Ala. Cr. App. May 16, 1978), rev'd on other grounds Ex Parte: Roy Frank Clements, ___ So. 2d ___ (Ala. Jan. 26, 1979), the Alabama Court of Criminal Appeals was presented with the argument that Alabama's statute did not provide for a comparative appellate review. In rejecting that argument, Ms. Op. at 8-9, the Court said:

> "As Judge Harris pointed out in Jerry Wayne Jacobs, supra, the Supreme Court of Alabama, in the past thirty-five years, has reviewed approximately ninety-five death cases and has reversed twenty-five of them for various reasons, including excessive punishment, and also where the verdict was contrary to the great preponderance of the evidence.
>
> "This court in Evans and Ritter v. State, Ala. Cr. App., 1 Div. 837, Ms. October 25, 1977, expressly pointed out that we would also weigh the aggravating and mitigating circumstances independently. Therefore, appellant's contention is without merit."

Since the time of the Alabama Supreme Court's review of the sentence in Jacobs v. State, supra, and the Alabama Court of Criminal Appeals opinion in Roy Frank Clements v. State, supra, more death penalty cases have reached the appellate level. This has made possible a comparison of the sentence under review with other sentences which have been reviewed under the same statute. An example of a case in which this comparative appellate review was explicitly performed in an appellate opinion is Beck v. State, 365 So. 2d 985, 1005 (Ala. Cr. App. 1978), aff'd 365 So. 2d 1006, where the Alabama Court of Criminal Appeals held:

> "We have also considered the mitigating and aggravating circumstances and have found that under the facts of this case, death was the appropriate penalty.
>
> "The facts in this case, after a careful evaluation, show a marked similarity with those in Jacobs v. State, supra.
>
> "It seems to us that the result is inescapable that the punishment, too, should be the same."

In summary, all capital cases in which a sentence of death is imposed upon a defendant are automatically reviewed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. These two appellate courts independently weigh the aggravating and mitigating circumstances to determine the appropriateness of the sentence. Comparative appellate review is also performed at the appellate level.

VII.

ALABAMA'S DEATH PENALTY ACT DOES NOT PROVIDE A MANDATORY SENTENCING PROCEDURE.

Petitioner's argument that both the judges and juries acting under Alabama's capital statute automatically impose the death sentence upon conviction for certain offenses is really a gathering of the arguments in previous sections of his petition, and are, again, unfounded.

Petitioner claims that the statute is mandatory because jurors are required, upon conviction, to "fix the punishment at death." As explained fully in section II of this brief, even though the statute is phrased such that the jury must "fix the punishment at death," this is only an adjudication of guilt and not a sentence. The jury's function under the Alabama statute is to determine guilt or innocence. Jacobs v. State, 361 So. 2d 607, 631 (Ala. 1978). While a jury verdict of guilt is a necessary step

in the sentencing process, the judge is the actual sentencing authority. Jacobs, supra, at 640. No sentence exists until the judge pronounces one after he has held a post-conviction sentence hearing. Beck v. State, 365 So. 2d 985, 1005 (Ala. Cr. App. 1978).

Petitioner further alleges that the statute is mandatory because the trial judge acts as a "rubber stamp" for the jury verdict at the sentencing hearing and fails to give individualized consideration to every defendant. This allegation is refuted in sections IV and V of this brief. Petitioner claims that there is an 86% death sentence rate in Alabama capital punishment cases and that there is no individualized consideration of the character and record of a particular offender or the circumstances of a particular offense. Petitioner offers no further proof to substantiate this claim. Undoubtedly, the claim cannot be substantiated. In the present case, for example, there was a lengthy sentencing hearing in which the judge was presented with a great deal of information regarding the character and record of Clyde Cade. Of course, most of the evidence was presented by the State because the Defendant chose not to introduce character evidence at that hearing.

The evidence showed that Cade had a long, long record, including offenses involving extreme violence. The judge can only consider such evidence of character as is presented to him. He did consider character and prior record, as his sentence reflects. Further, Respondent submits that the 86% death sentence rate is not accurate, but even if it were, it substantiates the position that the statute is not mandatory.

Finally, Petitioner claims that the Appellate Courts simply act as a rubber stamp for the trial court and fail to exercise comparative review of sentences. This claim

is disproved in the preceding section, section VI, of this brief.

By definition, under a mandatory death penalty act all defendants convicted of a capital offense are sentenced to death. Under Alabama's statute, the trial judge must hold a sentencing hearing and, after hearing aggravating and mitigating circumstances, can sentence a defendant to life imprisonment without parole.

As Justice Jones of the Alabama Supreme Court notes in his dissenting opinion (amended version) in this case, of the 65 death penalty convictions returned as of the date of his opinion, 22 of those defendants were sentenced to life imprisonment without parole. Of the 22 cases in which a defendant was sentenced to life without parole, 13 were the result of a negotiated guilty plea and agreement at trial. In the remaining 9 cases, the defendant was convicted at trial on a plea of not guilty and was then sentenced by the judge to life without parole.[4] These statistics prove that Alabama's act is not mandatory and that, even though a defendant is convicted under the act, he may receive a sentence of life imprisonment without parole.

VIII.

THE TRIAL JUDGE DID NOT CONSIDER THE JURY'S DEATH SENTENCE AS AN AGGRAVATING CIRCUMSTANCE IN FIXING THE PUNISHMENT AT DEATH.

The trial judge made extensive findings at the sentencing hearing. To say that he relied on the verdict of guilty by the jury in sentencing Cade would be an obvious exaggeration or

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[4]For a more complete breakdown of the results in Alabama death cases, see attached Appendix A.

misrepresentation of what appears in the record. The judge had not one, but two aggravating circumstances upon which to base the sentence of death. The fact that he mentioned the jury verdict in his summary of the total circumstances of the case can in no way be construed to mean he relied upon it. Of course, it is a part of the totality of the circumstances of the case, and that is the context in which it is mentioned. It would be ludicrous to pretend that the judge is not conscious of the jury verdict.

Justice Jones recognizes this and states, at p. 3 of his dissent in the Alabama Supreme Court's opinion, that "...I am not saying...that the trial judge does not, or should not, consider the verdict of guilty (otherwise the bifurcated sentencing hearing would not take place)..."[5] Justice Jones' primary objection seems to lie in the fact that the jury's verdict of guilty includes a pronouncement of death, and that the judge is aware of this pronouncement.

However, the trial judge is certainly aware that the pronouncement of death by the jury is only a formality to impress upon them the seriousness of their decision. There is absolutely no basis for concluding that the trial judge considered the fixing of punishment by the jury as an aggravating or mitigating circumstance. Here we respectfully disagree with Justice Jones.

The trial judge's language, in his written findings, is couched in the identical terms of §13-11-4, which states that the court, "...after weighing the aggravating and mitigating circumstances, and the fixing of the punishment at death by the jury, may accordingly sentence the defendant to death." The trial judge was obviously trying to comport with the language of the statute when he wrote, "The Court

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[5]Attached as Appendix B to Petitioner's petition.

...after weighing the aggravating and mitigating circumstances and the punishment of death by the jury, finds the defendant, Clyde Cade, should be sentenced to death."

The fact that the defendant had been sentenced was a factor the trial judge considered apart from the aggravating and mitigating circumstances. He stated that he weighed the aggravating and mitigating circumstances and the sentence of death. The jury verdict was mentioned in passing as a part of the summation of the stature of the case at the time Petitioner was sentenced. There is no support for an assumption that the trial judge went through the process of an extensive aggravation/mitigation hearing only to parrot the verdict of the jury. Such an assumption has no support in the record or in the written findings of the trial judge.

CONCLUSION

Based on the foregoing argument, Respondent submits that the Petition for Certiorari is due to be denied.

Respectfully submitted,

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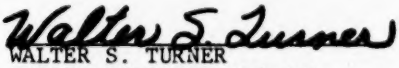

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CERTIFICATE OF SERVICE

I hereby certify that on this the 16th day of November, 1979, I served a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of Alabama on the attorney for Petitioner, by mailing a copy of the same to him, postage prepaid, and properly addressed as follows:

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Tuscaloosa, Alabama 35403

Linda C. Breland

LINDA C. BRELAND
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE

SOUTHERN DISTRICT OF ALABAMA

SOUTHERN DIVISION

U. S. DISTRICT COURT
SOU. DIST. ALA.
FILED IN CLERK'S OFFICE

MAY 14 1979

WILLIAM J. O'CONNOR
CLERK

JOHN LOUIS EVANS, III,
Petitioner,

v.

ROBERT G. BRITTON, ET AL.,
Respondents.

CIVIL ACTION NO. 79-0200-H

FIRST STIPULATION

The parties agree and stipulate as follows:

1. The Alabama Death Penalty Statute, Code of Alabama 1975, §§13-11-1 through 13-11-9, has been in effect since March 7, 1976. The remaining paragraphs in this statute describe the operation of the statute from that date to the present.

2. There are sixty-five (65) cases in which defendants have received a sentence hearing and been sentenced. In fifty-two (52) of these cases, the defendants were convicted by a jury after pleading not guilty. In the remaining thirteen (13) cases, the defendants were convicted on guilty pleas.

3. Of the sixty-five (65) cases in which defendants have been sentenced under the act, forty-three (43) resulted in death sentences and twenty-two (22) resulted in sentences of life without parole.

4. Of the twenty-two (22) cases in which a defendant was sentenced to life without parole, thirteen (13) were the result of a guilty plea and agreement at trial and the sentence hearing. In the remaining nine (9) cases, the defendant was convicted at trial on a plea of not guilty and was sentenced to life without parole.

5. In all of the nine (9) cases in which the defendant was convicted on a guilty plea at trial and received a sentence of life without parole, there was no agreement between the District Attorney and the defendant or his counsel to the sentence. However, in two (2) of these cases the District Attorney did not oppose the sentence of life without parole because the family of the victim recommended it. In the remaining seven (7) of these cases the sentence of life without parole was given over the active opposition of the District Attorneys involved.

6. The seven (7) cases in which defendants received sentences of life without parole over the active opposition of the District Attorney involved four different judges. One of the judges was responsible for three of the sentences, another judge was responsible for two of the sentences, and the remaining two sentences were given by two other judges.

7. There have been two (2) acquittals and three (3) mistrials in five different cases brought under the statute. Two of the mistrials have not been retried as of this date. The other mistrial was retried and the defendant was convicted and sentenced to death.

8. There have been four (4) cases in which defendants who were originally indicted for a capital offense under the statute were not brought to trial on that indictment but pursuant to an agreement were instead re-indicted and pled guilty and were convicted of a non-capital offense under another statute.

All of the preceding paragraphs are agreed and stipulated by the parties and their attorneys to be true and correct.

JOHN L. CARROLL

FOR THE PETITIONER

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FOR THE RESPONDENTS